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ROMAN LAW

IN THE MODERN WORLD

BY

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VOL. II

MANUAL OF ROMAN LAW ILLUSTRATED BY ANGLO-AMERICAN LAW AND THE MODERN CODES

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Uxor Alma Julia
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INTRODUCTION

INTRODUCTION

CHAPTER I

PROGRAM OF STUDY

The debt of modern jurisprudence to Roman law is revealed by a systematic study of Roman law with concurrent comparative investigation of modern law. It was Cicero, that celebrated Roman lawyer, statesman, and literary genius, who beautifully portrays the great truth our study will reveal: "There shall not be one law at Rome, and another at Athens, one now and another hereafter; but the one eternal and immutable law shall sway all nations for all time and be the common law and master of all."[1] Cicero's masterly conception of the ultimate oneness, continuity, and universality of legal principles is both scientific and modern. § 413

Roman law has now become the one for "all nations." The fall of the Roman Empire did not destroy Roman law, which at one time had governed the whole world from the Atlantic Ocean to the Persian Gulf. Just as soon as Rome's conquerors began to progress out of barbarism, Roman jurisprudence recommenced its sway, molding the law of each nation carved out of the destroyed Empire.[2] Roman law merely changed its garb, — that is all. And owing to this world-mission of Roman law since Justinian, the modern civilized nations now differ from one another in their private law chiefly as to details. And this fact will become prominent as our program of study is accomplished.

[1] "Nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus": Cicero, *De republica*, iii, 22. The English translation above is by Gibson, 31 Law Mag. and Review, p. 390.

[2] Supra vol. i, §§ 185–412; see also §§ 8–25.

(§ 413) We shall make a systematic study of the principles of Roman private law — illustrated, as to their survival, from Anglo-American[3] law and the Modern Codes.[4] And we shall see that Roman law has become the one law for all nations in Europe, America, and the civilized parts of Asia and Africa. Our method of investigation will proceed on the recognized utilities arising from repetition — of showing that a principle or doctrine of the Roman law is also generally contained in modern systems of jurisprudence. For we are going to appreciate the truism that "reiteration is the surest means of conviction."

Said James Bryce[5] when retiring from Oxford as Regius Professor of Civil Law[6]: "I will bequeath to my successor, whoever he may be, this maxim as the best practical result of my experience — that Roman law must always be taught so as to be brought into the closest relation with English law . . . It ought to be treated as a practical working system, full of life, not only because it is preserved to us in lifelike detail, but because it is actually in force as the operative law of some countries, full therefore of direct instruction and suggestion for ourselves, capable of being used to enlarge English conceptions or indicate useful modifications of English rules." But in our comparison of Roman and Anglo-American private law we shall soon notice this salient fact — that the resemblances of both systems exceed their differences.

We shall pay special attention to two great non-American branches of modern Roman law: French law and Spanish law. For the private law of the American state of Louisiana and the Canadian province of Quebec is still very largely French law.[7] And the private law of almost all the countries

[3] In this volume the expressions "**Anglo-American Law,**" "**English Law,**" "**English Common Law**" refer to the jurisprudence of both England and the United States; the expression "**Law of England**" refers to England alone; the expression "**American Law**" refers to the United States alone.

[4] Mexican Civil Code citations are to the Federal district code.

[5] Now Viscount Bryce, late Ambassador from Great Britain to the United States.

[6] In his Valedictory Lecture of June 10, 1893 (*Studies in history and jurisprudence*, p. 897, New York, 1901).

[7] See supra, vol. i, §§ 262–4.

of Central and South America,[8] of the islands of Porto Rico and the Philippines, and — to some extent — of the American states of California and Texas, is of Spanish origin.[9]

The order of subjects followed is usually that of the French Civil Code. The different subjects of Roman private law will ordinarily be considered according to the order of subjects of the present French Civil Code, sometimes called the Code Napoleon from its promulgator.[10] We may follow at times the order of subjects of some other code modeled on the French Code. For all the codes of Continental Europe (except Germany), all the codes of Spanish America, and the civil codes of Louisiana, California, and Quebec are constructed on the model of the French codification.[11] The influence of the Code Napoleon has been world-wide. But occasionally we shall follow the order of subjects of the German and Japanese civil codes.[12] § 414

In all the codifications of the 19th and 20th centuries there is a unity: the Modern Codes may be regarded as republications, to a large extent, of Justinian's monumental codification of Roman law[13] — but adapted to modern times and garbed in modern linguistic dresses.[14]

[8] The chief exceptions are British Honduras, the West Indian Islands, and the South American Guianas, which belong to European countries, and Brazil. See supra vol. i, § 278.

[9] See supra vol. i, §§ 306–10.

[10] See supra vol. i, § 254.

[11] See supra vol. i, § 258.

[12] See supra vol. i, §§ 313, 344.

[13] See supra vol. i, §§ 135–9.

[14] In other words, the Modern Codes are not written in Latin, but in French, German, Italian, Spanish, etc.

CHAPTER II

PERIODS OF ROMAN LAW

§ 415 **Three grand periods of Roman law.** When Justinian codified Roman law,[1] it had existed as a legal system for over 1300 years. In stating or discussing any Roman law principle, doctrine, or rule, this question immediately is forced upon us: what period of Roman law are we considering? does such and such a doctrine belong, for instance, to the age of Caesar or of Constantine or of Justinian? The Roman law of the Republic is one thing; the Roman law of the Later Empire is often an entirely different thing. The most convenient periods of Roman law are these three: the ante-Justinian, the Justinian, and the post-Justinian.

§ 416 **Ante-Justinian Roman law.** The best way to refer to the Roman law prior to Justinian is to call it the ante-Justinian law — a chronological designation which is most useful. But the vastness of this period and its attendant indefiniteness are remedied by the following epochal subdivisions.

(1) *Later Imperial Roman law.* This, in the widest sense, is the law of the Empire from Diocletian to the end of the Roman Empire, A.D. 284–1453, and thus includes both the Justinian and post-Justinian law.[2] But the first two and a half centuries of the Later Imperial law from Diocletian to Justinian, A.D. 284–527, belong to the period of Roman law prior to Justinian.[3]

(2) *Early Imperial Roman law.* This is the law of the Empire from Augustus to Diocletian,[4] 27 B.C.–A.D. 284. Included in the Early Imperial law is the so-called *classical Roman law* or the epoch of Roman law from Trajan to Severus inclusive,[5] A.D. 98–244. The Early Imperial law is the

[1] See supra vol. i, §§ 135 et seq.
[2] See infra §§ 417, 418.
[3] See supra vol. i, §§ 120–33.
[4] See supra vol. i, §§ 54–119.
[5] See supra vol. i, § 57.

epoch of all the Roman jurists,[6] except the Republican.[7] And the works of many of these Imperial jurists form an important part of Justinian's codification of Roman law.[8]

(3) *Later Republican Roman law.* This is the law of the last half century of the Republic,[9] 89–27 B.C.

(4) *Ancient Roman law.* This is the law of the Monarchy and of nearly all the Republic,[10] 753–89 B.C.

Justinian Roman law. This is the law of the Empire during the second quarter of the 6th century,[11] A.D. 527–65. It is the epoch of the fully developed Roman law. But this statement should be thus qualified: not every doctrine or institution of Roman law matured during the reign of Justinian — some matured during the Republic, and very many either during the Early Empire or during the first two centuries of the Later Empire. § 417

What Justinian did was to put into lasting shape, by means of a codification, the law of Rome, whether maturing before or during his reign. Hence Justinianean law is the *codified* Roman law. We shall ordinarily study and emphasize the Justinian Roman law, although often examining the process of its development.

Post-Justinian Roman law. This is the law of the Empire subsequent to Justinian and until the end of the Roman Empire,[12] A.D. 565–1453. It is in the Greek language. The post-Justinian law is called also the "Law of the Eastern Empire," "Graeco-Roman law," "Byzantine Roman law," "Byzantine law." Although we shall not often consider the post-Justinian law, yet this period is divisible into three epochs. § 418

(1) *Ante-Basilica Roman law.* This is the law of the Eastern Empire after Justinian to Leo VI and his Basilica,[13] or Roman law from the middle of the 6th century to very late in the 9th century, A.D. 565–c. 892.

(2) *Basilica Roman law.* This is the law of the Eastern Empire at the close of the 9th century.[14] About the year 892

[6] See supra vol. i, §§ 68–110.
[7] See supra vol. i, § 53.
[8] See supra vol. i, § 137.
[9] See supra vol. i, §§ 46–51.
[10] See supra vol. i, §§ 29–45.
[11] See supra vol. i, §§ 135–9.
[12] See supra vol. i, §§ 166–83.
[13] See supra vol. i, §§ 168–76.
[14] See supra vol. i, § 176.

(§ 418) the Emperor Leo VI promulgated a Greek abridgment of Justinian's codification. And Leo's legislation, known as the Basilica, gradually supplanted Justinian's codification, which by the end of the 10th century fell into disuse. But the Basilica continued to be employed until the end of the Eastern Roman Empire.[15]

(3) *Post-Basilica Roman law.* This is the law of the Eastern Empire after Leo VI to the fall of the Roman Empire in 1453, or, in other words, Roman law from the 10th to the middle of the 15th century.[16]

[15] And for several centuries later, see supra vol. i, §§ 177, 183, 189, 194, 195.

[16] See supra vol. i, §§ 178–82.

CHAPTER III

TERMS AND GENERAL PRINCIPLES

1. TERMS DESCRIBING ROMAN LAW

Roman law is known also as the "Civil Law". Use of the special terms "jus civile", "Quiritary law", "jus honorarium", "praetorian law", and "edictal law". The law of Rome, in addition to being called "Roman law," is also known as the "Civil Law" — a term frequently employed in both modern and Roman times. Both terms to-day are interchangeable and mean the same thing. §419

But the Romans originally called their law the "civil law" (jus civile), because it was the national law applicable to citizens (cives) only.[1] This national "civil law" was anciently called by the Romans "Quiritary law" — from "Quirites," the old title of Roman citizens.[2] The modern use of the term "civil" as opposed to "ecclesiastical" or "criminal" was unknown to the Romans.

The terms "jus honorarium", "praetorian law", "edictal law" refer to that part of Roman law which was originated by Roman magistrates.[3]

2. GENERAL PRINCIPLES AND DEFINITIONS[4]

Law defined. The Roman jurist Ulpian makes law identical with justice[5] — the art of bringing about "that which §420

[1] See supra vol. i, §§ 33, 40.

[2] *Id.*, § 40.

[3] See supra vol. i, §§ 44, 50, 56, 60–1.

[4] The idea of a preliminary title containing general principles and definitions is a special feature of the modern French Civil Code. It is repeated in the Italian, Spanish, Spanish-American, Louisiana, and California Civil Codes. In the newer German and Japanese codes this same feature is greatly enlarged (see book i of each code). Our discussion follows chiefly the order of arrangement of the Louisiana Code.

[5] *Dig.* 1, 1, 1, pr.

(§ 420) is right and equitable." [6] Such was the ideal of the Roman legal profession, and such should be the ideal of the lawyer of every age. Next should be given the Roman conception of law in actual practice (which the Emperor Justinian 300 years later appreciated so highly that he had it incorporated in the first page of his elementary text-book [7] for law students): "The precepts of the law," says Ulpian, "are these: to live uprightly, to injure no one, and to give every man his due." [8] Such was the sublime but practicable conception of a Roman jurist who probably never even heard of Christ's Sermon on the Mount.

Roman law acknowledged the close relationship between law and ethics, and that law really rests on moral principles. Cicero was perhaps the first Roman to predicate that law really rests in the innate natural consciousness of equity possessed by all mankind. And this truth is thus stated by him: "There is a true law conformable to justice, diffused through all hearts, unchangeable, eternal, which by its commands summons to duty, by its prohibitions deters from evil." [9]

But the Roman law did not confuse the precepts of morality with rules of law; Roman jurisprudence clearly recognizes the fact that a rule of conduct is a law *only* because it is made so and enforced by some arm of the sovereign authority in a State. "Those rules which a State enacts for its members . . . are called law," says Justinian,[10] repeating the words of the Roman jurist Gaius who lived four centuries earlier.[11] And Gaius goes on to say that "Roman law consists of statutes, . . . edicts of magistrates, and opinions of jurists." [12] All these are clearly enactments of the political sovereign; the rules of the praetor-made edictal law, the jurist-made law, and of the customary law are really law only by virtue of the silent acquiescence of the sovereign

[6] Morey, *Roman law*, p. 220.

[7] See supra vol. i, § 138.

[8] *Dig.* 1, 1, 10; *Inst.* 1, 1, 3.

[9] Cicero, *De republica*, iii, 22. The English translation given above is by Gibson, 31 Law Mag. and Rev., p. 390.

[10] *Inst.* 1, 2, 1.

[11] Gaius, 1, 1.

[12] Gaius, 1, 2. As to each of these, see supra vol. i, §§ 49–51, 111–15.

legislative power.[13] As to the indispensableness of a sanction, the very first clause in the Praetor's Edict makes compulsory under a penalty all its rules and every decision pronounced in accordance with them.[14] The Roman jurist Ulpian most emphatically states that a law (statute) approaches perfection when it has a penalty for violation attached to it.[15]

Written law, especially statutes. "Our law," declare the Institutes of Justinian,[16] "is partly written, partly unwritten, as among the Greeks." And then the Institutes proceed to state that the written Roman law is composed of statutes,[17] edicts of magistrates,[18] and opinions of jurists[19] — the last two of which were probably mentioned for reasons of Roman legal history, Imperial statutes having been the sole source of Roman law since the 3d century A.D.[20] §421

"A statute," says the Roman jurist Papinian, "is a command of general application, . . . a restraint of offenses committed either voluntarily or in ignorance, a general covenant on the part of the State."[21] Notice the emphasis which Roman law puts on the words "general application": "laws ought to be laid down . . . in respect of things which happen for the most part,"[22] says the Roman jurist Pomponius; "law ought to be framed to meet cases which occur frequently and easily, rather than such as very seldom happen,"[23] says the Roman jurist Celsus. This beneficent rule as to the framing of laws is embodied in the Civil Code of Louisiana,[24] that laws should "generally relate not to solitary or singular cases, but to what passes in the ordinary course of affairs."

"The use of a statute," says the Roman jurist Modestinus, "is as follows: to command, to prohibit, to permit, to punish.[25]

[13] See *Dig.* 1, 3, 35.

[14] Walker, *Edictum Julianum*, p. 33.

[15] Ulpian, *Reg.* 1, 2.

[16] *Inst.* 1, 2, 3.

[17] The varieties of Roman statutes — *lex*, *plebiscitum*, *senatus-consultum*, *constitutio* — are explained supra vol. i, §§ 49, 111, 114, 115, 184.

[18] *Edicta* and the *jus honorarium* are explained in vol. i, §§ 44, 50, 60–61, 112.

[19] *Responsa prudentium* are explained in vol. i, §§ 50, 68, 113.

[20] See supra vol. i, § 114.

[21] *Dig.* 1, 3, 1 (Monro's transl.).

[22] *Dig.* 1, 3, 3 (Monro).

[23] *Dig.* 1, 3, 5 (Monro).

[24] Art. 3.

[25] *Dig.* 1, 3, 7 (Monro).

The Roman law definition of a statute and its use is paraphrased in Anglo-American law by Blackstone [26] and Robinson,[27] the latter of whom states a statute to be "a rule of civil conduct, prescribed by competent political authority, commanding certain things as necessary to, and forbidding other certain things as inconsistent with, the peace and order of society."

§422 **Unwritten or customary law.** "The unwritten law," says Justinian," [28] "is that which usage has approved: for ancient customs, when approved by consent of those who follow them, are like statute." Article 21 of the Louisiana Civil Code reads as follows: "In all civil matters where there is no express law the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason or received usages where positive law is silent." A like doctrine forms part of French and Spanish law.[29]

Anglo-American law treats custom as a source of law. And there are various similarities between the Roman and the English law of custom: (1) no custom can prevail against a statute or decision [30]; (2) to explain a will or contract, evidence of modern usage is admissible [31]; (3) any contract may be modified by customs of trade and agriculture [32]; (4) no custom is enforceable without the co-operation of the courts [33].

But can a statute be abrogated by disuse and a failure to observe, that is by a custom opposed to the statute? The Early Imperial Roman law held, according to the jurist Julian, that it can.[34] But the Later Imperial Roman law did not favor this rule which savored too much of the freedom of

[26] *Commentaries*, vol. i, pp. 39, 44.

[27] *Elementary law*[2], §1.

[28] *Inst.* 1, 2, 9 (Moyle's transl.)

[29] *Civil code* of France, 4; Spain, 6. A similar doctrine prevails in other modern law: Porto Rico, 7; Argentina, 15–16; Chile, 19–27.

[30] *Code*, 8, 53, 2; *Goodwin* v. *Robarts*, L. R. 10 Exch. 357.

[31] *Dig.* 33, 6, 9, pr; *Dashwood* v. *Magniac*, 3 Ch. 306 (1891); *Re Paul*, 24 Q. B. Div. 247.

[32] *Nov.* 122; *Wigglesworth* v. *Dallison*, 1 Smith's Leading Cases.

[33] Sohm (Ledlie[3]), *Roman law*, p. 54; Williams, *Inst. of Justinian*[2], *etc.*, p. 15.

[34] *Dig.* 1, 3, 32, 1; *Inst.* 1, 2, 11.

the age of the Republic.[35] The Early Imperial Roman rule — (§ 422) permitting a statute to be abrogated by custom — is applied to-day to statutes in Scotland, namely, those passed prior to the Act of Union with England in 1707.[36] The English law, however, does not admit of the abrogation of a statute by desuetude.[37] And the rule is the same in Spanish and Italian law, both of which hold that no disuse or custom to the contrary can prevail against a statute not repealed.[38]

But a rule of customary law may be abrogated by long usage to the contrary. This is a firmly established rule of modern as well as Roman law. The American case of *Effinger* v. *Lewis*[39] not only decided that a legal right enforceable by action may arise from customary law in the absence of positive written law, but it further held that a rule of later customary law may abrogate a rule of earlier customary law — which actually was the fact in the case before the court. The court based its decision on various Roman law texts of the Corpus Juris of Justinian, which discuss the creation, nature, permanency, and mutability of customary law.

Roman law seems to have fixed no length of time for the validity of a custom. All it required was that it must be of long standing. English law is different here. The reign of Richard I arbitrarily fixes the time of "legal memory." But generally evidence of uninterrupted usage is presumptively sufficient — it may be rebutted — to establish such a custom or a custom in the nature of an easement. Customs of trade or agriculture need not be so strictly proved in English law.[40]

Another slight difference is this: in Roman law customs of procedure and succession were principally important, while in English law customs of agricultural and mercantile contracts are principally important.[41]

[35] *Code*, 8, 52, 2; Moyle, *Inst. of Justinian*[5], vol. i, p. 108, note.

[36] Mackenzie, *Roman law*[7], p. 58.

[37] *Coke on Littleton*, 81b; *Ashford* v. *Thornton*, 1 Barn. and Adolph., p. 405; Williams, *Inst. of Justinian*[2], p. 15.

[38] *Civil code* of Italy, art. 5; Spain, 5; Argentina, 17; Mexico 8–9; Chile, 2; Porto Rico, 5.

[39] 32 Pa. St. Rep. 367 (1859).

[40] See Williams, *Inst. of Justinian*[2], pp. 15, 16.

[41] *Id.*

Roman law, as found in French law, is the source of any unwritten Louisiana civil law.[42] But in almost all the other American states the English Common Law is the source of American unwritten law.[43] In the American colonial dependencies of Porto Rico and the Philippines, it is the Roman-Spanish law which is the common law of these islands.[44]

§ 423 **Publication of laws.** From Roman law comes that well-known maxim of Anglo-American law that "ignorance of the law excuses no one,"[45] which is also the doctrine of other modern systems of law like the Spanish, and the Louisiana law of French origin.[46] This refers of course to ignorance of the law *after* its promulgation.[47]

§ 424 **Effects of laws.** Article 5 of the Austrian Civil Code reads as follows: "Laws are not retroactive; they have therefore no influence on acts, which have taken place before, and on rights, which have been acquired before."[48] "Laws shall not have a retroactive effect, unless the contrary is provided in them," is a provision of the Spanish and Porto Rican civil codes[49]; "a law can prescribe only for the future; it can have no retrospective operation" is the provision of the French, Louisiana, and Italian civil codes,[50] all of which on this point read the same. Now all these similar provisions of modern law merely repeat the Roman law as to the retroactive effect of laws, which is contained in a statute of the Emperors

[42] See supra vol. i, §§ 263 et seq.

[43] See supra vol. i, §§ 392, 402, 309.

[44] See supra vol. i, § 310.

[45] "Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere": *Dig.* 22, 6, 9; see also *Id.* 7. "Ignorantia facti, non juris, excusat" is the form of the maxim in Canon Law: *Corpus Juris Canon., Sexti. Decretal.*, book 5, tit. 12 *de reg. juris Bonifacius VIII*, regula xiii; "Ignorantia juris neminem excusat" is the form in Blackstone, *Com.* vol. iv, p. 27; 1 Plowd., p. 343; Broom, *Legal maxims*, pp. 190, 197.

[46] *Civil code* of Spain, 2; Porto Rico, 2; Louisiana, 7. For similar provisions see *Civil code* of Argentina, 20; Chile, 8; Mexico, 21.

[47] *La. civil code*, art. 7.

[48] Winiwarter's English translation of this code.

[49] Spain, 3 (Walton Eng. transl.); Porto Rico, 3.

[50] Louisiana, 8; France, 2; Italy, 2. A similar provision exists also in the *Civil codes* of Mexico, 5; Chile, 9; Argentina, 3; Portugal, 8.

Theodosius and Valentinian.[51] The Anglo-American law is in harmony with the Roman: *ex post facto* laws are generally prohibited in the United States, both in state and Federal jurisprudence, usually by constitutional provisions.[52]

That "acts executed against the provisions of law are null," [53] ordinarily, is true in all modern as well as Roman jurisprudence. But "rights granted by the laws may be renounced, provided they are not contrary to public interest or order, or prejudicial to a third person." [54]

Application and construction of laws. "It is not like a lawyer," says the Roman jurist Celsus, "to take hold of one particular portion of a statute and found a judgment or opinion upon it without examining the whole statute." [55] That statutes must be construed as a whole, is a principle of law of universal application in modern times throughout the world. § 425

Repeal of laws. The familiar rules of construction that subsequent laws repeal prior laws, and that a general act may or may not repeal a special act,[56] have their genesis and origin in the Roman law [57]; and these principles are of universal application in all modern systems of law.[58] Such repeal of course may be in whole or in part. § 426

Departments of law: public and private. "The study of law," says Justinian (repeating the words of the Roman jurist Ulpian), "consists of two branches, public law and private law. Public law is that which relates to the welfare of the . . . State; private law looks at the interest of individuals." [59] The systems of law of all modern civilized § 427

[51] *Code*, 1, 14, 7 (A D. 440).

[52] See Broom, *Maxims*, p. 29; 2 Peters' Rep. (U.S.), 683; Cooley, *Prin. of const. law*, pp. 296–8.

[53] *Civil code* of Spain (Walton), 4; Porto Rico, 4; France, 6; Louisiana, 6; Chile, 10; Mexico, 7. See also *Code of Justinian*, 1, 2, 14, 1.

[54] Spain, *Id.*

[55] *Dig.* 1, 3, 24 (Monro).

[56] See *State* v. *Judge*, 49 La. Ann. Rep. 1017.

[57] Fommelt, *Reg. juris*, "Lex," pp. 80–1.

[58] Broom, *Maxims*, pp. 23–25. See also *Civil code* of Spain, 5; Mexico, 8–9; Argentina, 17; Chile, 2; Porto Rico, 5.

[59] *Inst.* 1, 1, 4 (Moyle); *Dig.* 1, 1, 1, 2 (Monro).

(§ 427) States are arrangeable into these two departments of public and private law. The chief divisions of public law are these: constitutional, administrative, and criminal law. The Roman law rule laid down by the jurist Papinian that public law cannot be controlled or altered at the will of individuals by private agreements,[60] is firmly established in all modern systems of law.[61]

[60] *Dig.* 2, 14, 38.

[61] See for instance the *Civil code* of France, 6; Spain, 4; Louisiana, 11; Chile, 10–12; Argentina, 18–19; Mexico, 7.

PART I

PRIVATE LAW

PART I

PRIVATE LAW

Divisions of Roman private law. Says the Roman jurist Gaius,[1] whom Justinian affirms[2]: "The whole of the law which we observe relates either to persons, or to things, or to actions. And first let us speak of persons: for it is useless to know the law without knowing the persons for whose sake it was established." These three classes of the subjects of private law hold good when we turn to all systems of modern jurisprudence. We shall study the law of persons and the law of things or property according to the order of treatment of these two subjects as found in the French Civil Code. For this order of treatment has been copied throughout the world — in the civil codes of Italy, Spain, Belgium, Holland, all the Spanish-American States, Porto Rico, and the Philippines, and the American states of Louisiana and California. After we have finished the law of persons and of property, we will then study the law of procedure. §428

[1] Gaius, 1, 8.
[2] *Inst.* 1, 2, 12 (Moyle).

BOOK I

PERSONS

BOOK I

PERSONS

Person defined. The legal idea of a "person" is not the popular one. "Person" and "individual" must not be confounded. Not every individual is a legal person. Persons are the subjects of legal rights and duties. In other words, they "are capable of holding property, and of having claims and liabilities."[3] Or if completely analyzed, "a person, then in the sense of private law, is a being endowed with proprietary capacity."[4] The word "person" comes from the Latin *persona* (theatrical mask). In law it is applied to the part the individual plays in society rather than to the individual himself: for the individual can fill successively different parts, playing in turn for instance the part of creditor, owner, father, guardian — there are as many *personae* (or masks) as there are parts.[5] §429

The two kinds of persons: natural and artificial. Roman law and all modern law distinguish two kinds of persons: the natural and the artificial or juristic. Natural persons are human beings who have proprietary capacity. Artificial or juristic persons are other than human beings — such as the State, cities, corporations. We shall first consider "natural persons", and then "artificial persons" — which is also the order of treatment employed in the Louisiana Civil Code. §430

[3] Sohm (Ledlie[3]), *Roman law*, p. 161.

[4] *Id.*

[5] See Bernard (Sherman), *Roman law*, §102.

TITLE I

NATURAL PERSONS

CHAPTER I

PERSONALITY

Personality defined. It has been already intimated that not all natural human beings or men have "legal personality", that is, are persons *legally*. How is this determined? By examining a man, woman, or child's status or civil position in the State of which he or she is a member. It will then be seen that some natural persons, either by nature or for artificial reasons, are disqualified to be "legal persons". The necessity of ascertaining what constitutes "legal personality" is obvious.[1] §431

Personality — also termed "civil position", "legal position", "civil capacity", "legal capacity", "status" — is composed of three things: freedom or personal liberty, citizenship, and domestic position. A human being, to have full proprietary capacity in Roman law, must be free, a citizen, and *sui juris* or independent of paternal authority. These are the elements of his personality. This Roman conception of personality prevails in modern law; but to-day less emphasis is placed on the first element, freedom, and the last element, family or domestic position.

Change of status (capitis deminutio). Loss of any of the three elements of status was technically described in Roman law as capitis deminutio.[2] And the loss of the greater §432

[1] The topic of personality will be discussed, to some extent, according to the order of treatment employed in the Swiss Civil Code.

[2] "Capitis deminutionis tria genera sunt, maxima media minima: tria enim sunt quae habemus, libertatem civitatem familiam," — *Dig.* 4, 5, 11. On capitis deminutio and the general principles of personality, see Gaius, 1, 159–64; Paul. *Sent.* 5, 5b; Ulpian, *Reg.* 4, 1; *Inst.* 1, 16; *Dig.* 4, 5; *Code*, 9, 25, De mutatione nominis; *Nov.* 142; Theophilus, 1, 16; *Bas.* 31, 8–9, *Bas.* 46, 1–2; infra §453; Desserteaux, *La transformation*

involved a loss of the lesser elements[3]: to lose freedom[4] included in Roman law also the loss of citizenship[5] and family rights[6]; to lose citizenship deprived a person also of family rights. Loss or change of status is an *incapacity of law* and not a natural incapacity. Natural or actual incapacity is a deprivation of civil rights due to sex, age, birth, state of mind, political circumstances.

§433 **The conditions essential for the exercise of civil rights are: freedom, citizenship, sanity, and majority.** The object of personality is the exhibition of proprietary capacity, or, as the Swiss Code[7] restates the Roman law, "whosoever exercises civil rights is capable of acquiring property and obligating himself." To enjoy civil rights a man must have his personal liberty, must be a citizen, must be freed of his minority either by attaining majority or by emancipation from parental control, and must be sane or mentally sound.

1. ENJOYMENT AND EXERCISE OF CIVIL RIGHTS

(1) Freedom or Personal Liberty (Status Libertatis)

§434 **Freedom is a necessary element of personality. In the Roman world, freedom and slavery were sharply contrasted. Slavery defined.** In Roman law a person's capacity to exercise civil rights depended primarily upon whether he was free or a slave. Freedom and slavery were sharply contrasted, as was inevitable in a society where slavery was tolerated. It is to the credit of the Roman jurists that they never justified slavery; they accepted it only as a creature of immemorial custom arising as one of the consequences of war.

d'une controverse . . . de la cap. deminutio (in *Mélanges P. F. Girard*, vol. i, pp. 353–8, Paris, 1912); Desserteaux, *Études sur la formation de la cap. demin*, Paris, 1909; Hunter, *Roman law*[4], pp. 214–20; Savigny, *System, etc.*, vol. i, §§ 60–84, 103; *Id.* vol. ii, appendices 1–7; *Id.* vol. viii, §§ 362–5, 389.

[3] See *Dig.* 4, 5, 11.

[4] *Maxima capitis deminutio.*

[5] *Minor vel media capitis deminutio.*

[6] *Minima capitis deminutio.*

[7] *Civil code*, art. 12.

Slavery was the denial of "the natural right of a person to do as he pleases," [8] and it consisted in the subjection of an individual to the ownership of another. The slave was a thing or chattel — nothing more, legally. Slaves could hold no property. Even their possession of a few personal belongings was always temporary and at the will of the master. Slaves could not marry. Their actual unions were never legally recognized.

In the modern civilized world, slavery no longer exists. §435 The fundamental position of modern law is that every human being is or ought to be free, and that one man's freedom is as good as another's. No one can alienate his liberty.[9] But it has taken a long development for modern law to reach this position. Slavery — the opposite of freedom — still existed in parts of the civilized world early in the 19th century, and in America was abolished only fifty years ago.

The entire subject of slavery, as found in Roman law, is without parallel in modern times, and of little interest or force except as legal history. But many of the Roman law rules as to slavery were duplicated in the private law of some of the American southern states prior to the Civil War.[10]

Policy of the Imperial Roman law as to slavery. With §436 the advent of Greek culture and Christianity, the harsh manners of ancient Rome became greatly softened. The Later Imperial Roman law favored greatly the manumission of slaves: a mere declaration to set free, made before a magistrate, was sufficient. But when slaves were manumitted, did they have uniform capacity with free-born persons? In the ante-Justinian law they did not; in the Justinian law freed persons are put on actual equality with free-born persons.

[8] *Inst.* 1, 3, pr. and § 1.

[9] *Civil code* of Switzerland, 12.

[10] For instance, articles 172–94 of the original text of the Louisiana Civil Code (see especially the 1838 edition, French and English texts) contain nearly all the Roman law rules as to slavery: slaves are chattels; are incapable of marriage; children born follow the condition of the slave mother; slaves are given a *peculium* or limited property; the noxal surrender of slaves is provided for; and even the existence of a vicarious slave, or the slave of another slave, may be possible.

Furthermore, the maltreatment or abuse of slaves was rigorously punished.[11] And lastly, the law always favored freedom at the expense of slavery whenever a person's status was questioned. Although children born of a slave mother were slaves, yet it was held that if only the mother had been free for a single moment between the conception and birth of a child, the child would be born free.

§ 437 **Loss of freedom by captivity in war. The jus postliminii and lex Cornelia.** In Roman law freedom was lost by a free man being made a prisoner of war by a hostile people. The consequences of this predicament were, however, mitigated by two peculiar rules of law — the jus postliminii and the lex Cornelia.

(1) *Jus postliminii.* If a Roman citizen was ransomed or exchanged as a prisoner of war and returned to the fatherland, he was regarded as never having been a captive. This is the fiction of the law of the threshold — jus postliminii. Consequently his paternal power over his children and his entire proprietary capacity were restored as soon as the captive reached Roman soil.[12]

The expression "jus postliminii" is used to-day in modern international law in certain senses considerably reminiscent of its Roman signification: the right of States "to be reinstated in property and rights accidentally lost or illegally taken away"; as to private property, the right of the original owner "to a revesting of his property if recaptured by his countrymen before the enemy have held it twenty-four hours"; the right of prisoners of war to be restored to their original position upon being released.[13]

(2) *Lex Cornelia.*[14] If a Roman citizen was captured in war and never returned, he was regarded as having died just when he was captured. This is the fiction usually described

[11] See supra vol. i, §§ 69, 150.

[12] On the *jus postliminii*, see *Cod. Theod.* 5, 7; Gaius, 1, 129; *Inst.* 1, 12, 5; *Inst.* 3, 1, 4; *Dig.* 49, 15; *Code*, 8, 50 (51); Theophilus, 1, 12, 5; 3, 1, 4; *Bas.* 34, 1–2; Hunter, *Roman law*[4], pp. 216–17.

[13] Williams, *Inst. of Justinian*[2], p. 30.

[14] *Lex Cornelia de falsis*, 81 B.C.

as that of the lex Cornelia.[15] Hence his will made prior to captivity was upheld by the Roman courts.

Loss of freedom by persons condemned to penal servitude (servi poenae). Freedom was lost also by condemnation to penal servitude in the mines of the State[16] or to be killed in the arena by wild beasts.[17] It is creditable to Justinian's humanity that he abolished servitude arising from being sentenced to the mines.[18] §438

The clients (clientes). A special class of free persons, very important during the Roman Monarchy and the Republic, needs special notice: these are the clients.[19] Of the origin of the clientela we know little. The clientes probably arose in two ways: (1) from freed persons and their descendants; (2) from conquered peoples taken to Rome but not deprived of their liberty. The similarities between the Roman clientela and the ancient Scotch manrent[20] are interesting.[21] §439

The coloni. During the Later Empire, toward the close of the Roman Empire in the West, arose the coloni.[22] These §440

[15] On the *lex Cornelia* see Hunter, *Roman law*[4], p. 216; Sohm (Ledlie[3]), *Roman law*, p. 179.

[16] "In metallum."

[17] "In bestias." As to the *servi poenae*, see Gaius, 1, 160; *Inst.* 1, 12, 3; *Inst.* 1, 16, 1; Hunter, *Roman law*[4], pp. 215, 218. See also infra "civil death," §452.

[18] *Nov.* 22, ch. 8.

[19] As to the *clientes*, see *XII Tables*, 8, 21; Amos, *Roman law*, pp. 20, 266; Hunter, *Roman law*[4], p. 4; Mackeldey (Dropsie), *Roman law*[14], §21; Muirhead, *Roman law*[2], pp. 8, 10; Sohm (Ledlie[3]), *Roman law*, pp. 38, 39, 172.

[20] Abolished 1457–1555 by the Parliament of Scotland.

[21] See Bartholemew, *Bonds of manrent*, 23 Juridical Rev., p. 42 (1911).

[22] As to the *coloni*, see *Cod. Hermogenian.*, De eorum contractibus, qui alieno jure; *Cod. Theod.* 4, 23; *Cod. Theod.* 5, 17–19; *Cod. Theod.* 11, 24; *Nov. Leo and Severus*, 2; *Nov. Valentinian.*, 31; *Dig.* 43, 33; *Code*, 11, 48 (47); *Code*, 11, 50 (49)–54 (53); *Code*, 11, 63 (62)–64 (63); *Code*, 11, 69 (68); *Nov.* 156, 157, and 162 (ch. 23); *Const. dispersae* (see *Nov.*, appendix), 1, 6, and 9; *Bas.* 55, 1–5, also 7–9, also 11–13; *Bas.* 60, 19; *Hexabiblos*, leges agrariae, 1 and 3; Esmein, *Les colons, etc.* (in *Mélanges*, pp. 293–322, Paris, 1886); Hunter, *Roman law*[4], pp. 162–3; Kroell, *Étude . . . des lites (laeti) en droit françias* (in vol. ii, *Études d'hist. jurid. off. à P. F. Girard*, pp. 125–208, Paris, 1913); Meynial, *Note sur la loi emptorum, Code*, 4, 66, 9 (in *Mélanges Gérardin*, pp. 413–35, Paris,

'tenant-farmers' although personally free were forever attached to an estate of land, which they never could leave and for which they owed a permanent rent to their 'landlord'. The colonatus is an ancestor of the medieval serfdom and villenage.

(2) Citizenship (Status Civitatis)

§441 **Citizenship is a necessary element of personality.** Citizenship is a topic of public law.[23] But the legal capacity of a person depends upon whether he is a citizen or a foreigner. For the domicil of a person is ordinarily determined by his citizenship.[24]

§442 **Grades of citizenship during the Republic, and the Early Empire prior to Caracalla: Romans, Latins, provincial subjects (peregrini).** In Republican and Early Imperial Roman law citizenship as an element of personality was extremely important. For there were three classes of citizens: Romans or full citizens (cives), Latins or partial citizens, and peregrini or provincial subjects of Rome who were really not citizens at all. The Romans or full citizens need no explanation. But the other two classes require a separate consideration.

Anciently, all men outside the Roman State were regarded as enemies and barbarians; a free man who was not a Roman citizen was known as a foreigner or alien (peregrinus). With the expansion of Rome, a large and ever increasing number of free persons who were subjects of Rome became added to the State; these free persons who were subjects and non-citizens of Rome were also called peregrini, into which class might fall Roman citizens who had lost their citizenship. Peregrini down to the Late Republic might be expelled from the city; they could not wear the national dress, nor originally could they appear in court without being represented by a

1907); Muirhead, *Roman law*[2], p. 358–60; Rostowzew, *Studien zur Geschichte des röm. Kolonatus*, 1910; Smith, *Dict. of antiq.* "colonatus"; Zuluetta, *De patrociniis vicorum* (*Oxford studies in leg. hist.*, vol. i, p. 1). See also infra vol. iii, §§ 984–5.

[23] Supra § 427.

[24] See *Civil code* of Switzerland, 22.

Roman citizen as patron (patronus) prior to the establishment of the court for alien subjects and foreigners (peregrini).[25]

In a middle position between the Roman citizen and the peregrinus or foreign subject, was the Latin, who possessed some, but not all, of the rights of Roman citizenship. The Italian peoples, better known as Latins, after a long struggle finally obtained full Roman citizenship in B.C. 89 as a result of the Social War.[26] Thereafter Rome was chary about granting its citizenship to inhabitants outside of Italy, although sometimes by alliance or otherwise cities outside of the Italian peninsula might obtain Roman citizenship.[27] But during the first two centuries of the Early Empire grants of citizenship became more frequent owing to the administrative advantages arising from its bestowal.[28] The Emperor Claudius, whose birthplace was Lyons, gave Roman citizenship to some of the Gauls; the Emperors Trajan and Hadrian, both born in Spain, were generous to some of the Spaniards.

§ 443 **By Caracalla's Edict of A.D. 212, full Roman citizenship was given to all free inhabitants of the Empire.** The long-standing distinction between Roman citizens and Roman subjects (peregrini) was finally wiped out by a statute of the Emperor Caracalla promulgated A.D. 212, which gave full citizenship to all free provincial subjects throughout the Empire.[29] Thereafter the provinces bordering on the Atlantic Ocean, and all between them and the Euphrates, were put on an equality with Italy. Caracalla did this to increase his revenue from the inheritance tax of 5%, to which all Roman citizens were subject.[30]

After the Edict of Caracalla the grades of citizenship lost their importance, and by the time of Justinian questions of Roman citizenship had practically ceased to exist. The status of citizenship finds no place in Justinianean Roman

[25] See supra vol. i, § 43.

[26] Or war between Rome and her Latin allies. See supra vol. i, §§ 42, 47.

[27] The city of Tarsus, in Asia Minor, was in alliance with Rome. St. Paul, who was born at Tarsus of free parents, thus became a full Roman citizen.

[28] Girard, *Manuel de droit romain* [6], p. 116.

[29] See supra vol. i, § 58.

[30] *Lex Julia de vicesima hereditatium*, Gaius, 3, 125, — a law of the Emperor Augustus taxing successions for support of the army.

law: his Institutes do not discuss it. There was but one class of citizens — namely free persons. Citizenship was universally the same throughout the Roman world. In all modern law citizenship is usually full and complete throughout the territory of a State, although suffrage rights differ according to sex, and, in some countries, according to property qualifications.

§444 **Domicil.** A person's citizenship may be determined by his domicil. Furthermore, domicil fixes a person's residence for purposes of taxation. In Roman law domicil was employed largely to attach a person to some town or city[31]; in modern law domicil is not only a method for this, but it is used more exclusively to determine what national or state law is applicable by courts of justice to an individual. But the modern principle that "domicil fixes jurisdiction"[32] originated in Roman law.[33]

The domicil of a person is, in Roman law, that place which he has selected as his permanent residence.[34] Domicil is

[31] In Roman law, individuals were attached to urban communities by *origo* or *domicilium*. The former refers to the acquisition of citizenship by birth, etc.: "Municipem aut nativitas facit, aut manumissio, aut adoptio," *Dig.* 50, 1, 1, pr.; "Cives quidem origo manumissio adlectio adoptio, incolas vero . . . domicilium facit," *Code*, 10, 40 (39), 7, pr.

[32] Wharton, *Conflict of laws*[2], § 82.

[33] "Incola et his magistratibus parere debet, apud quos incola est, et illis, apud quos civis est: nec tantum municipali jurisdictioni in utroque municipio subjectus est, verum etiam omnibus publicis numeribus fungi debet," — *Dig.* 50, 1, 29.

[34] "Eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet, suarumque rerum constitutionem fecisset," — *Dig.* 50, 16, 203; "Incolas vero . . . domicilium facit. Et in eodem loco singulos habere domicilium non ambiguitur, ubi quis larem rerumque ac fortunarum suarum constituit, unde rursus non discessurus, si nihil avocet, unde cum profectus est, peregrinari videtur, quo si rediit, peregrinari jam destitit," — *Code*, 10, 40 (39), 7. On the subject of domicil see also Paulus, *Sent.* 1, 1a, 3–8; *Dig.* 35, 1, 71, 2; *Dig.* 50, 1, Ad municipalem et de incolis; *Dig.* 50, 16, De verb significatione, 239, 2; *Code*, 10, 40 (39), De incolis et ubi quis domicilium habere videtur, etc.; *Bas.* 54, 2 (same title); Savigny, *System des röm. Rechts*, vol. viii, §§ 350–69; Wharton, *Conflict of laws*[2], §§ 20–82, 396, 704 et seq.; Mackeldey (Dropsie), *Roman law*[14], § 149; Brissaud (Howell), *History of French private law*, p. 658 note, Boston, 1912; Baty, *Polarized law*, pp. 109–76, London, 1914.

similarly defined in modern law, for instance that of England, (§ 444) the United States, France, Germany, Spain, Switzerland, and Japan.[35]

Two things constitute domicil in Roman and modern law: the intention to permanently remain in a place, and the fact of remaining there. "Change of domicil is proved by facts and actions, not by a simple declaration," says the Roman jurist Paulus.[36] This Roman rule as to change of domicil is the same in Anglo-American law: "When a domicil is in any way acquired," says Chief Justice Parsons of Massachusetts, "it may be changed, by a change both in fact and in intent, but not by either change alone; the change in fact not being enough without intent, nor the change in intent without the change in fact."[37]

So strict was the original Roman law rule as to the necessity of the domiciliary intent (animus manendi) that, prior to Hadrian, no student residing at an educational institution could acquire a domicil where the educational institution was located — no matter how long he resided there; but the Emperor Hadrian modified this rule by making possible the acquisition of a domicil after ten years' residence.[38] And American law to-day also insists on strictness as to the domiciliary intent of students at a college or university town.[39]

A Roman citizen might have several domicils for business purposes.[40] This enjoyment of several domicils limited to business purposes is really but a special use of the word "domicil." Plurality of domicils is permitted in modern law, for instance that of Switzerland and of Germany.[41] And

[35] Robinson, *Elementary law*[2], §§ 22; Black, *Law dictionary*[2], "Domicil"; *Civil code* of Louisiana, 38, 41–2; France, 102–3; Germany, 7; Spain, 40; Switzerland, 23; Japan, 22.

[36] "Domicilium re et facto transfertur, non nuda contestatione," — *Dig.* 50, 1, 20 (translated by Phillimore, *Maxims*, p. 162).

[37] Parsons, *Contracts*[8], vol. ii, p. 694.

[38] *Code*, 10, 40 (39), 2, pr. See also *Dig.* 47, 10, 5, 5.

[39] Wharton, *Conflict of laws*[2], § 48; *Granby* v. *Amherst*, 7 Mass. 1. One reason is the great confusion into which the estates of deceased students would be thrown.

[40] *Dig.* 50, 1, fr. 5, and fr. 6, § 2; *Dig.* 50, 1, 27, 2.

[41] *Civil code* of Switzerland, 23; Germany, 7.

a plaintiff may elect to sue a defendant wherever he has a domicil, if the latter has several domicils.[42] But in these countries no one can have at one time more than one principal domicil.[43]

In all modern civilized countries the domicil of a married woman is that of her husband.[44] Here modern law merely repeats the Roman law rule that a wife has the same domicil as her husband.[45]

(3) Sanity

§ 445 **Mental discernment is indispensable to the exercise of legal capacity.** All persons who are *non compos mentis*, that is, imbecile[46] or insane,[47] cannot exercise personality either in Roman or in modern law.[48] It makes no difference what is their sex, age, or condition. To this class of unfortunates are added by analogy persons who have to be prevented from wasting their property, namely spendthrifts or prodigals.[49]

[42] Wharton, *Conflict of laws*[2], § 82.

[43] *Id.*

[44] *Civil code* of France, 108; Germany, 10; Louisiana, 39; Switzerland, 25; Wharton, *Conflict of laws*[2], § 43.

[45] *Dig.* 23, 2, 5; *Dig.* 50, 1, 38, 3; *Dig.* 5, 1, 65; *Code*, 10, 40 (39), 9; *Code*, 12, 1, 13.

[46] The *stulti*, *fatui*, *insani*, *simplices*, *mente capti*. See *Dig.* 22, 3, 25, 1; *Dig.* 26, 10, 3, 18; *Dig.* 27, 1, 6, 19; *Inst.* 1, 23, 4.

[47] The *furiosi* (maniacs) and *dementes* (lunatics), — *Dig.* 26, 5, 8, 1; *Code*, 5, 4, 25. Legally there is no difference between these two classes of the insane.

[48] The management of the property of the insane is exercised by a guardian — called *curator* in Roman law. See *Dig.* 27, 10, 1, pr.; *Inst.* 1, 23, 3 and 4; infra "guardianship," § 533; Hunter, *Roman law*[4], pp. 130, 153, 606, 732–5; Mackeldey (Dropsie), *Roman law*[14], §§ 139, 637; Sohm (Ledlie[3]), *Roman law*, pp. 216–17, 219, 489, 492; Robinson, *Elements of American jurisprudence*, §§ 40, 330; *Civil code* of France, 489–512; Germany, 6, 104, 1896 et seq.; Spain, 200, 213, 278, 281, 283, 663, 742.

[49] The *prodigi* must be judicially adjudged such and prohibited to manage their property (*quibus bonis interdictum*). See Ulpian, *Reg.* 12, 3; *Inst.* 1, 23, 3; *Dig.* 27, 10, 1 and 13; infra "guardianship", § 533; Hunter, *Roman law*[4], pp. 609, 732, 797, 803, 1006; Mackeldey (Dropsie), *Roman law*[14], § 638; Sohm (Ledlie[3]), *Roman law*, pp. 216, 219, 489, 492, 499, 541, 548; Robinson, *El. Am. jurisp.*, § 40; *Civil code* of France, 513–15; Germany, 6, 104, 1896 et seq.; Spain, 66, 200, 221–7, 278.

The affairs of this entire class of mentally abnormal human beings are managed for them. In the Roman law this wise provision is as old as the law of the XII Tables of nearly 2400 years ago.[50] Persons appointed to manage their affairs are called in American law by such titles as guardians, curators, committeemen, conservators.

The incapacity of idiots and lunatics is an actual one only to the limited extent of their inability to obligate themselves or their property: all weak-minded or mentally diseased persons are not deprived of any legal advantages they can enjoy — they retain their property and their capacity to inherit.[51] Such incapacitated persons are often called in modern law "interdicted persons," and this term includes not only the insane, but spendthrifts, habitual drunkards, and other "incapables." [52]

(4) Majority

§ 446

In Roman law all persons (whether young or old) were normally subject to the paternal power of their family head, and ordinarily could not become sui juris before the death of the paterfamilias, unless in his lifetime he released them by emancipation. In modern law the paternal or parental power always expires by limitation — namely when the minor child attains full age or majority.[53] But in Roman law all children or grandchildren usually remained under the power of their father or grandfather until his death, unless emancipated in his lifetime.[54]

The Roman emancipation (*emancipatio*) or release from the paternal power was effected in ante-Justinian law by the roundabout process of three fictitious sales,[55] and in Justinian's

[50] *XII Tables*, v, 8. See supra vol. i, § 37.

[51] See *Inst.* 3, 1, 3; *Civil code* of Louisiana, 33; Switzerland, 19.

[52] *Civil code* of Louisiana, 33; France, 489; Germany, 6; Spain, 228; Porto Rico, 259. The word "interdicted" is of Roman law origin: see Paulus, *Sent.* 3, 4a, 7, — "bonis interdicitur"; *Dig.* 48, 22, "De interdictis," etc.

[53] See infra §§ 447–8.

[54] See infra "paternal power," § 514.

[55] *Mancipationes*.

time by merely a simple declaration before the proper magistrate.[56] An emancipated person, if twenty-five years old,[57] became at once possessed of complete legal capacity, and as fully sui juris as if his family head were dead.

Modern "emancipation"[58] is considerably reminiscent of the Roman emancipatio. The Roman law rule that "children are only very rarely able to compel their parent to release them from his power"[59] holds good as to the modern law "emancipation", which is something voluntarily bestowed upon a minor and not to be demanded by him. Both Roman and modern
§ 447 law require that the minor consent to his emancipation.[60]

Majority or full age in Roman law was 25 years. Majority occurs when an individual ceases to be a minor.[61] Majority or full age in Roman law was fixed at 25 years.[62] And 25 years is also majority in modern Chilean law.[63]

But generally in modern law majority is attained a little earlier: at 24 years in Austria[64]; at 23 years in Spain[65]; at 22 years in Argentina[66]; at 21 years in Belgium, France, Germany, Great Britain, the United States, Italy, Mexico, Portugal, Switzerland, Louisiana, Porto Rico, and Quebec[67]; and at 20 years in Japan.[68]

[56] See *XII Tables*, iv, 3; Gaius, 1, 132; *Inst.* 1, 12, 6; infra § 452.

[57] See infra § 447.

[58] See infra § 448.

[59] *Inst.* 1, 12, 10 (Moyle).

[60] Paul. *Sent.* 2, 25, 5; *Code*, 8, 49, 5; Nov. 89, ch. 11, pr.; *Civil code* of Germany, 4.

[61] "Minor" usually meant in Roman law a person subject to that form of guardianship known as curatorship. The distinction as to *majores aut minores XXV annis* was first introduced by the *Lex Plaetoria*, 254–184 B.C.

[62] *Code*, 2, 44 (45), 4; *Inst.* 1, 14, 2; *Inst.* 1, 23, pr.

[63] *Civil code* of Chile, 26.

[64] *Civil code* of Austria, 21.

[65] *Civil code* of Spain, 320.

[66] *Civil code* of Argentina, 126.

[67] *Civil code* of Belgium, 388, 488; France, 388, 488; Germany, 2; Robinson, *Elementary law*[2], § 182, *Elements of Am. jurisprudence*, § 25; *Civil code* of Italy, 328; Mexico, 362; Portugal, 311; Switzerland, 14; Louisiana, 37, Porto Rico, 317; Quebec, 246.

[68] *Civil code* of Japan, 3.

Men over 20 and women over 18 years of age might obtain the venia aetatis, which gave a minor many of the rights of majority. On petition to the Emperor many of the privileges of full age might be anticipated by a minor approaching his majority, who could show that he was mature enough to be granted this dispensation from minority known as venia aetatis.[69] To apply for this favor a man must be 20, and a woman 18 years of age.[70] A minor who had received the venia aetatis was made capable of contracting obligations. But he was forbidden to make gifts[71]; and, until he became 25 years old, he could not alienate or mortgage his land without an order of court.[72] § 448

Similar in many respects to the Roman venia aetatis[73] is the modern law "emancipation", a term employed in many of the Modern Codes. In Anglo-American law this "emancipation" is commonly referred to as "giving him (the minor) his time."[74] Modern law generally, like the Roman, provides that minors of either sex who are approaching majority may be enabled to realize much of the legal capacity of full age; such "emancipated" children obtain usually a contractual capacity more or less restricted (including the right to receive and dispose of their wages), and are largely freed from filial duties.

At the commencement of the 19th year "emancipation" may be permitted in Germany, Switzerland, Italy, Spain, Portugal, Porto Rico.[75] Mexico fixes "emancipation" from the 18th year onward.[76] French law and Louisiana law permit "emancipation" from the beginning of the 16th year onward.[77]

[69] See *Code*, 2, 44 (45). This palliation of the inconveniences of minority arose under the Early Empire in the reign of Septimius Severus, — Girard, *Manuel de droit romain*[5], p. 234.

[70] *Code*, 2, 44 (45), 2.

[71] See Girard, *Id.*

[72] Girard, *Id.*; Bernard (Sherman), *Roman law*, § 421.

[73] And also to the Roman *emancipatio*, — see supra § 446.

[74] Terry, *Common Law*, p. 684; Parsons, *Contracts*[8], vol. i, p. 310.

[75] *Civil code* of Germany, 3; Switzerland, 15; Italy, 310; Spain, 318; Portugal, 308; Porto Rico, 314.

[76] Mexico, 591.

[77] *Civil code* of France, 477; Louisiana, 366.

Finally, in modern law a minor is also ipso facto "emancipated" by marriage from parental control.[78] This, however, was not always true in Roman law.[79]

§ 449 **Minors and also persons of full age might be restored to their previous condition (in integrum restitutio minorum XXV annis, restitutio majorum XXV annis).** Where a minor had been taken advantage of in any transaction, even though validly concluded, his imprudence could ordinarily[80] be remedied in Roman law by an application[81] to the praetor or some other appropriate court for an annulment or rescission of the transaction — thus restoring the minor to his original position.

In integrum restitutio was a general remedy available to any minor who could show that his minority had been the cause of loss or damage to him. But restoration to the previous condition could be applied for also by a person of full age on proof of loss or damage arising in cases of fraud, intimidation, mistake, and absence from home.[82]

In English law the expression "restitutio in integrum" is often employed.[83] And rescission or annulment of a contract accompanied by judicial restoration to the previous position is a remedy not confined to minors, but may be claimed on equitable grounds, such as fraud, by persons of full age.[84]

[78] *Civil code* of France, 476; Switzerland, 14; Italy, 310; Portugal, 304; Louisiana, 365; Spain, 314; Chile, 266; Argentina, 131; Porto Rico, 302; Mexico, 590.

[79] See infra "marriage," § 468; "paternal power," §§ 508, 510.

[80] If the minor himself had committed a fraud, or upon reaching his majority had ratified any previous contract, no relief was granted, — *Dig.* 4, 4, 9, 2; *Code*, 2, 46, 2.

[81] Under the system of procedure of the Early Empire (see supra vol. i, § 122) the proceedings in restitution before the praetor, then termed *judicium rescindens*, was followed by the supplementary so-called *judicium rescissorium* — the trial of the *actio restitutoria* or *rescissoria* already granted.

[82] See *Code*, 2, 53 (54); supra § 437; infra "juristic acts," § 748.

[83] See, for instance, *Cox* v. *Hakes*, 15 Appeal Cases, 547.

[84] Parsons, *Contracts*[8], vol. i, pp. 294, 321; Black, *Law dictionary*[2], "Restitution," p. 1030.

2. COMMENCEMENT AND END OF PERSONALITY

Birth. The Swiss Civil Code very succinctly repeats the Roman law as to when a human being commences and ceases to be a legal person, article 31 reading as follows: "Personality begins with the completed birth of a living child; it is ended by death. A child conceived enjoys civil rights, provided it be born alive." [85] The rule giving civil rights to a child *en ventre sa mère* is of special importance in the law of inheritance: by its operation the estate of a father will devolve on his child who is born after his death — a "posthumous" child as he or she is termed. This is the use of a legal fiction to treat, for the purpose of inheriting, the child *in utero* as if already born. These Roman law rules as to the commencement of personality by birth have descended into all modern law: for instance Anglo-American law, the law of Germany, France, Spain, Spanish America, Italy, Austria, and Japan.[86] §450

In the Roman law it was finally settled by Justinian that it is not necessary that a child be heard to cry in order to be born alive, but that it is sufficient if the child has breathed for an instant after birth.[87] And this is also the criterion for a completed birth in certain modern law.[88] But the modern law of some countries requires that, for civil effects, a child shall live 24 hours after birth.[89]

Physical or natural death. In both Roman and modern law, personality or legal capacity is always terminated by death.[90] Minority, lack of mental discernment, or being §451

[85] For the Roman law on this subject, see *Dig.* 1, 5, 7; *Dig.* 1, 5, 26; *Dig.* 50, 16, 231 and 161; *Dig.* 35, 2, 9, 1.

[86] Robinson, *American jurisprudence*, § 17; Terry, *Common Law*, §§ 210, 503; *Civil code* of Germany, 1, 1923; Austria, 22; Spain, 29; Japan, 1, 968; Italy, 724; Louisiana, 26–30, 953–4; Porto Rico, 24; Argentina, 70; Chile, 74; Mexico, 11.

[87] *Code*, 6, 29, 3; Mackenzie, *Roman law* [7], p. 72.

[88] *Civil code* of Louisiana, 956; France, 725, 906; Porto Rico, 24; Robinson, *Elementary law* [2], § 31.

[89] *Civil code* of Spain, 30; Philippines, 30.

[90] Mackeldey (Dropsie), *Roman law* [14], § 153; *Civil code* of Spain, 32; Porto Rico, 25; Switzerland, 31; Robinson, *American jurisprudence*, §§ 17–18; Robinson, *Elementary law* [2], § 31.

placed under guardianship do not, like death, extinguish personality: these are but restrictions upon the exercise of civil capacity.[91]

§ 452 **Civil death.** Modern law recognizes only natural death; but Roman law held that a person's legal capacity might be extinguished by "civil" death. To lose either freedom or citizenship [92] produced civil death or the loss of all the rights given to a person by private law — as to these rights the unfortunate individual was regarded as dead.[93] A Roman citizen ordinarily suffered civil death when he was punished for the commission of a serious crime, for instance if condemned to exile,[94] or sentenced to be deported to an island,[95] or if condemned to the mines.[96] But Roman law provided that the Emperor might fully pardon the offender and restore him to his original state as a citizen, the pardon being regarded as annihilating the conviction and sentence.[97]

It is interesting to note that the French and Quebec civil codes originally provided for the infliction of civil death [98]; but this was abolished in 1854 in France and in 1907 in Quebec.[99]

§ 453 **Infamy (infamia), or the impairment of civic honor (existimationis minutio).** A Roman citizen's reputation or civic honor (existimatio) might be lost or diminished. Any change of a person's status, involving the loss of freedom or citizenship,[100]

[91] This distinction is clearly made in *Civil code* of Spain, art. 32. See also supra §§ 445–9.

[92] Technically, to suffer a change of status or a *capitis deminutio* (*maxima* if freedom were lost, *media*, if citizenship). See supra §§ 432, 437–8.

[93] *Dig.* 50, 17, 209; *Inst.* 1, 12, 1.

[94] *Inst.* 1, 16, 2 ("interdictio aqua et igni").

[95] *Inst.* 1, 12, 1; *Inst.* 1, 16, 2 (this penalty replaced, in the Imperial law, that of expatriation). The punishment of "relegation" or banishment to an island did not involve civil death, — *Dig.* 48, 22, 4.

[96] *Inst.* 1, 12, 3 (the so-called "servi poenae"). See supra § 438.

[97] *Dig.* 48, 19, 27, pr: *Dig.* 48, 23, 1; *Code*, 9, 51, 1.

[98] *Civil code of* France, art. 22–3; Quebec, 31–8.

[99] Law of May 31, 1854, in France; 6 Edward VII, ch. 38, §§ 1 and 2, in Quebec.

[100] *Capitis deminutio maxima*, or *media:* see supra § 432. But *capitis deminutio minima* had no such consequence.

destroyed his previous personality.[101] But a person's civic honor (existimatio) might be impaired [102] by various disabilities due to reprehensible conduct or avocation or because of the commission of crimes; and this diminution of full civic honor was called infamia.[103] It was known also as *turpido*.[104] Persons to whom infamy had attached were designated in the law as infamous (infames or turpes).

An infamous person did not entirely lose his previous legal capacity. Among his disabilities were the following: he was prohibited from acting in court as attorney [105]; he was excluded from public offices and the right to vote [106]; and he could not act as witness [107] (*intestabilis*) or have others for witnesses—thus being prohibited from making a will.[108] Only the Emperor could remove infamy when once inflicted by judicial decree.[109]

Quite reminiscent of the Roman *infamia*, if not of civil death,[110] is the Anglo-American deprivation of certain civil and political rights (more especially the political rights of suffrage and of holding public office) which arises from conviction for a felony or some grave criminal offense.[111]

Proof of life and death. Physical death, like life, must ordinarily be proved, not presumed. In Roman law the § 454

[101] "(Existimatio) consumitur, . . . cum libertas adimitur," etc., *Dig.* 50, 13, 5, 3.

[102] "Minuitur existimatio," etc., *Dig.* 50, 13, 5, 2.

[103] See *Dig.* 3, 2; *Code*, 2, 11 (12); *Dig.* 48, 1, 7; *Dig.* 47, 15, 4; *Dig.* 47, 12, 1 and 3; *Inst.* 4, 16, 2; *Gaius*, 4, 182.

[104] *Dig.* 22, 5, 3; *Dig.* 37, 15, 2; *Dig.* 50, 2, 12; *Code*, 12, 1, 2; *Code*, 3, 28, 27.

[105] *Dig.* 3, 1, 1, 1, 5. This was a provision of the Praetor's Edict. See also *Dig.* 47, 23, 4; *Inst.* 4, 13, 11; *Dig.* 1, 22, 2.

[106] This originated under the Republic and was continued under the Empire. See *Code*, 12, 1, 2; *Dig.* 48, 1, 7, pr.

[107] *Dig.* 22, 5, 15, pr.

[108] *Dig.* 28, 1, 26.

[109] *Dig.* 3, 1, 1, 10. For further details as to *infamia*, see infra vol. iii, § 987.

[110] Supra § 452.

[111] See Williams, *Institutes of Justinian*[2], pp. 29, 35; Cooley, *Constitutional law*[2], pp. 262, 269.

highest age of man is sometimes regarded as 100 years[112]; but these statements are not really evidence of the length of human life. However, it is quite interesting to observe that the 100 years' period is found to-day in the law of France and Louisiana — these modern legal systems permit all persons, who may have rights, to obtain absolute possession of the estate of an absentee after a century has elapsed since the birth of the absentee.[113]

§ 455 **Simultaneous death of several persons and the presumption of survivorship.** Where several persons die about the same time, and there is no evidence to show which one died first, the Roman law presumed that they died simultaneously.[114] Identical with this Roman rule is the law of Germany, Austria, Italy, Portugal, Spain, Porto Rico, Chile, Argentina, Mexico, Great Britain, and the United States.[115]

But there was an exception in Roman law to this general rule as to survivorship in cases of simultaneous death: namely, if the several persons were entitled to inherit from each other (parent and child), the presumption then is that children under the age of puberty perish *before*, and children above the age of puberty *after*, their parents.[116] This Roman exception is found in the law of France and Louisiana.[117] And English law makes the same presumption as the Roman.[118] Finally,

[112] *Dig.* 7, 1, 56 (duration of a usufruct granted to a corporation); *Code*, 1, 2, 23, 3 (pr.) and 4 (1). The latter relates to prescription against churches and charitable institutions.

[113] *Civil code* of France, 129; Louisiana, 70.

[114] *Dig.* 34, 5, 18, pr.; *Dig.* 34, 5, fragm. 8; fragm. 16, pr.; fragm. 17; Hunter, *Roman law*[4], p. 928.

[115] *Civil code* of Germany, 20; Austria, 25; Italy, 924; Portugal, 1738; Spain, 33; Porto Rico, 26; Chile, 79; Argentina, 109; Mexico, 3233; Stephen, *Digest of evidence* (Beers' Ohio edition, 1902), § 99 (see list of states given).

[116] *Dig.* 34, 5, 9, 1 and 4; *Dig.* 34, 5, fragm. 22 and 23; *Dig.* 23, 4, 26, pr.; *Dig.* 36, 1, 17, 7; Hunter, *Roman law*[4], p. 929. But see also *Dig.* 34, 5, 9, 2; *Dig.* 36, 1, 18, 7 for certain unimportant exceptions. As to cases of persons not parent and child, see *Dig.* 34, 5, fragm. 8; fragm. 9, pr. and 3; fragm. 16, 17, 18, pr.; *Dig.* 24, 1, 32, 14; *Dig.* 39, 6, 26.

[117] *Civil code* of France, 720–722, Louisiana, 936–88.

[118] Reeves, *Med. jurisprudence*, ch. 12, p. 53; *The Titanic disaster as raising questions of survivorship*, 74 Central Law Journal, p. 419 (1912).

if husband and wife perished together, the Roman law presumed ordinarily that the husband — the male — died last.[119] And this is also the rule in French and Louisiana law, provided the spouses were of practically the same age.[120]

Presumption of death from absence. When a person has disappeared and for a long time has not been heard of, proof of death becomes an important question. As to this question the Roman law is silent. Modern law, with the aid of reasoning drawn from Roman law principles, has filled in this juridical gap. In Anglo-American law, death is presumed from 7 years' absence by the absentee, who during this time has not been heard of.[121] In other modern law the period of time necessary to raise the presumption of an absentee's death varies from 1 to 10 years — according to the peril or age of the absentee.[122] The effect of a declaration of death opens the estate of the absentee to all who have rights of succession thereto.[123] And their possession is temporary or permanent, depending upon the circumstances of each case. § 456

[119] See *Dig.* 34, 5, 17; *Dig.* 34, 5, 8; Hunter, *Roman law*[4], p. 928.

[120] *Civil code* of France, 722; Louisiana, 939. But this rule is not limited to husband and wife only. See also 74 Central Law Journal, pp. 416–21.

[121] Stephen, *Digest of evidence*, § 99 (Beers, 1902 Ohio edition).

[122] *Civil code* of France, 115–21 (4 or 10 years); Germany, 14, 17 (3, 5, or 10 years); Spain, 184, 185 (2 or 6 years); Switzerland, 36 (1 or 5 years); Louisiana, 57–8 (5 or 7 years).

[123] *Id.*

CHAPTER II

THE FAMILY (*STATUS FAMILIAE*)

§457 **Domestic or family position is a necessary element of personality.** In Roman law, persons were considered with reference to the family relations by dividing them into persons *sui juris* or *alieni juris*, that is, independent of or dependent upon paternal authority. In modern law this status has not altogether passed away. But modern law lays the emphasis on the *natural incapacity* of the dependent members of the family.

Roman law based this status upon the patriarchal theory of the family — that the father or grandfather was the legal head of the family, and that he alone sustained any legal relations to society or the State. But the tendency of Roman legislation during the Empire was, as will be seen later,[1] to increasingly recognize that the wife and children had legal rights; and the outcome was practical independence of the wife and older members of the household as to personal and proprietary rights even during the lifetime of the head of the family (paterfamilias).

§458 **Family law will be treated separately.** Family law may be discussed as a part of the subject of personality; but it is much more convenient to separately group the law of family, as has been done in the most recent modern codes — the German, Japanese, and Swiss.[2] The family as an institution arises from marriage or its equivalent. For this reason the modern French Civil Code and all the other codifications of private law subsequent to the Code Napoleon start the law of the family relations with the topic of *marriage*, and then treat the paternal power as a consequence of marriage[3] — which it really is.

[1] See infra "paternal power," §§ 505 et seq.

[2] *Civil code* of Germany, book 4; Japan, book 4; Switzerland, book 2.

[3] *Civil code* of France, 144–475; Austria, 44–284; Germany, 1297–1921; Spain, 42–313; Italy, 53–309; Porto Rico, 129–301; Louisiana,

The order of the Institutes of Justinian is the reverse of the Code Napoleon: in harmony with the actual stages of life itself, the Roman law starts the family relations with the *paternal power*, which normally confronts the individual in his childhood. In many respects this Roman order of treatment is preferable.[4] But we are following the order of the Modern Codes, and we will commence the law of family with the topic of marriage.

1. MARRIAGE

(1) Betrothal (Sponsalia)

Effects of betrothal. Action for breach of promise to marry was unknown to Roman law. While marriage at Rome might be preceded by sponsalia or a mutual promise to marry in the future,[5] this was not enforceable at the suit of either affianced party so as to compel marriage.[6] The Austrian, French, German, Swiss, Italian, Spanish and Spanish-American law is like the Roman in holding that betrothal creates only a moral obligation to marry and is not enforceable by a legal action.[7] To be betrothed to more than one person at the same time made the party at fault liable in Roman law for infamy (infamia[8]). § 459

A Roman betrothal might be mutually dissolved or repudiated by either party. If mutually dissolved, the betrothal gifts (*arrae sponsalitiae*) should be returned to each party.[9]

86–426; California, 55–258; Mexico, 155–597; Argentina, 159–494; Chile, 98–544; Switzerland, 90–456; Japan, 765–963.

[4] The order of treatment of the law of persons in the Institutes of Justinian is as follows: *paternal power*, *marriage*, *adoption*, *legitimation*, *guardianship*.

[5] *Dig.* 23, 1; *Code*, 5, 1.

[6] *Code*, 5, 1, 1; *Dig.* 24, 2, 2, 2; Mackenzie, *Roman law*[7], p. 96; *Mackeldey* (Dropsie), *Roman law*[14], § 550.

[7] *Civil code* of Austria, 45; Germany, 1297; Switzerland, 91; Italy, 53; Spain, 43; Mexico, 160; Argentina, 166; Chile, 98, 99; note 2 to art. 1297, Grasserie's French translation of the German Civil Code.

[8] See *Dig.* 3, 2, 1; supra § 453.

[9] *Code*, 5, 1, 3.

And generally in modern law either party may demand the return of the presents given to the other party.[10]

But if a Roman betrothal was repudiated[11] without cause, the party at fault forfeited the betrothal gift or any present of money.[12] And if the woman was the offending party, ordinarily she had to return not only the betrothal gift but also its value as a penalty.[13]

But the Roman law did not allow an action for damages where there was a breach of a mere promise to marry.[14] And this is also the law of certain modern States, for instance Austria, Germany, Italy, Spain, Switzerland, Chile.[15] English law is contrary to the Roman and Continental European law, and allows an action for breach of promise of marriage. This action has been possible since the middle of the 17th century.[16] Prior to that time a promise to marry was enforced by ecclesiastical excommunication. But there is a slight approach to the English rule in Continental European law, which, in certain cases, permits an action for expenses incurred for a marriage which never came off, or for any real injury — such as seduction.[17]

(2) Requisites for Entrance into Marriage

§460 **Lawful marriage (justae nuptiae) and its three requisites.** Lawful marriage, known in Roman law as justae nuptiae, was one of the privileges of Roman citizens.[18] It at once gave

[10] For instance, see the *Civil code* of Germany, 1301; Switzerland, 94.

[11] The usual words were: "Conditione tua non utor": *Dig.* 24, 2, 2, 2. It was called "repudium": *Dig.* 50, 16, 101, 1; *Dig.* 24, 3, 38.

[12] *Code*, 5, 1, 3; *Dig.* 45, 1, 134.

[13] *Code*, 5, 1, 5, 1; *Code*, 1, 4, 16; *Code*, 5, 3, 15–16. See also *Cod. Theod.* 3, 5, 6.

[14] *Code*, 5, 1, 1; *Dig.* 24, 2, 2, 2; *Dig.* 45, 1, 134; *Code*, 8, 39, 2; Sohm (Ledlie[3]), *Roman law*, p. 457; Mackeldey (Dropsie), *Roman* law[14], § 550.

[15] *Civil code* of Austria, 45; Germany, 1297; Italy, 53; Spain, 43; Switzerland, 91–2; Chile, 99.

[16] See *Bowen* v. *Chirney*, 20 Q. B. Div. 505.

[17] *Civil code* of Germany, 1298; Austria, 46; Italy, 54; Spain, 44; Switzerland, 92–3 (the Swiss law allows damages for *moral* reparation, and is the nearest to English law). See *Dig.* 45, 1, 134. For Roman law textual references to betrothal, see infra vol. iii, § 988.

[18] See supra §§ 441 et seq.

the husband paternal power over all children born of the marriage.[19] Moreover originally, in the ancient law of the Republic, marriage gave the husband marital power (*manus*) over his wife; but even before the Empire was established precautions dating from the law of the XII Tables were possible whereby the husband could be prevented from acquiring the marital power; and late in the 2d century of the Empire the marital power had become merely an antiquarian curiosity.[20] But in all stages of Roman law, marriage was a mutual contract between Roman citizens, and served as the basis of the paternal power.[21] The wife took her husband's name, as she does in modern times.[22] The conditions essential to forming a lawful marriage were these three: the right to marry (connubium), puberty, and consent.

A. THE RIGHT TO MARRY (CONNUBIUM)

Nature and scope of the right to marry. Connubium meant legal capacity to contract lawful marriage. This was a privilege of citizens alone. No slave could contract justae nuptiae.[23] Moreover, during the Republic and for awhile under the Early Empire, Roman subjects not citizens (peregrini) were also similarly incapacitated.[24] §461

Polygamy was never allowed by Roman law, and a subsisting marriage was a bar — as in modern law — to entering upon a second marriage.[25] Absolute impotency existing before marriage disqualified a person from contracting marriage,[26] and if attempted, such marriage could be

[19] Marriage furnishes a means for ascertaining the father: "pater est, quem nuptiae demonstrant," — *Dig.* 2, 4, 5.

[20] See infra §§ 469 et seq.

[21] *Inst.* 1, 10, pr.; *Inst.* 1, 9, pr. See also infra "paternal power," §§ 505 et seq.

[22] Colquhoun, *Roman law*, § 556.

[23] Ulpian, *Reg.* 5, 5. Their union was known as *contubernium*.

[24] Ulpian, *Reg.* 5, 4. See supra § 443.

[25] *Inst.* 1, 10, 6 and 7; *Dig.* 3, 2, 1; *Code*, 5, 5, 2.

[26] *Dig.* 23, 3, 39, 1; *Dig.* 28, 2, 6. But the Roman law distinguished between the *castrati* (whose impotency had been artificially caused) and the *spadones* (impotent because of health, etc.), declaring only the castrated to be legally incapable of contracting marriage.

dissolved.[27] This Roman rule is found in modern law, for instance Spanish, Austrian, Anglo-American, Mexican, and Californian law.[28]

§462 **Impediments to marriage: (1) prohibitions of a political nature or due to public policy.** In Ancient Republican Roman law, marriages between plebeians and patricians were prohibited[29]; and the free-born (ingenui) and the freed (liberti) were not allowed to intermarry until after the Empire was established.[30] Prior to Justinian the marriages of senators and actresses or women of shameful profession were prohibited.[31] The Imperial Roman law forbade the marriage of the governor of a province with one of his female subjects[32]: but he might take her as a concubine.[33] During the Later Empire, Christians and Jews could not intermarry.[34] And in modern Austrian law, marriages between Christians and non-Christians (Jews, Moslems) are forbidden.[35]

In Roman law an adulterous spouse could not marry the paramour[36]; and this rule is still found in modern law, for instance that of Austria, Germany, France, Spain, Louisiana, and Scotland.[37] But the Canon Law ordinarily permitted

[27] That impotency or unfruitfulness might be ground for dissolution of a marriage, see *Code*, 5, 17, 10; *Nov.* 22, ch. 6; *Nov.* 117, ch. 12.

[28] *Civil code* of Spain, 83; Austria, 60; Terry, *Common Law*, p. 671; *Civil code* of Mexico, 257; California, 56.

[29] Livy 1, 4. Connubium with the patricians was acquired by the plebeians in 445 B.C. by the *lex Canuleia*.

[30] Down to A.D. 9 and the first *lex Julia de maritandis ordinibus*,— *Dig.* 23, 2, 23.

[31] Ulpian, *Reg.* title 13, and 16, § 2; *Dig.* 23, 2, 43, §§ 7–13, and fragment 44. These prohibitions were raised by Justin, the uncle of Justinian, — *Code*, 5, 4, 23, § 1. See also *Code*, 5, 4, 28 and 29; *Nov.* 78, ch. 3; *Nov.* 117, ch. 6.

[32] *Code Theod.* 3, 11, *Code*, 5, titles 2 and 7; *Dig.* 23, 2, fr. 38, 57, and 63. This prohibition was entended also to other provincial officers.

[33] *Dig.* 23, 2, 65, 1; *Dig.* 25, 7, 5. This was intended to prevent rapacious officials from marrying women in order to get their property as dowry. See as to concubinage (an inferior sort of marriage), infra § 483.

[34] *Code Theod.* 3, 7, 2; *Code Theod.* 9, 7, 5; *Code*, 1, 9, 6 (A.D. 388).

[35] *Civil Code*, 64.

[36] *Dig.* 23, 2, 26; *Dig.* 34, 9, 13; *Nov.* 134, ch. 12.

[37] *Civil code* of Austria, 67; Germany, 1312, 1328; France, 298; Spain, 84; Louisiana, 298; 1 Encycl. Britan.[11], p. 234.

such a marriage[38]; and such is also the law to-day in the United States, where commonly intermarriage with the paramour is not prohibited.[39]

Between the seducer and the seduced, marriage was forbidden in the Roman law subsequent to Constantine.[40] But the Canon Law did not forbid such a marriage when the seduced, without intimidation by the seducer, voluntarily consented to marriage.[41] And such is also commonly the rule of American law.[42]

Guardians or their children could not marry the ward.[43] This Roman rule still lingers to-day: for instance in Mexican and Argentine law no guardian can marry his ward or ex-ward, unless he first obtain a dispensation.[44] Because of religious scruples Justinian prohibited marriage between the baptized and his or her sponsor.[45] Monks and nuns,[46] also certain ecclesiastical dignitaries of eminence in the Church,[47] were forbidden to marry.

Impediments to marriage: (2) relationship. Ties of kinship in Roman law; cognation and agnation. Consanguinity or relationship is the connection of kinship between two or more persons. Kinship based on connection by blood is often termed true or natural relationship. The Roman law called it cognation (cognatio). By the natural blood tie there should be no discrimination between paternal and maternal relatives. § 463

[38] X (*Decretals of Gregory IX*), 4, 7, ch. 1, 3, 6.

[39] But although allowable in England (Schuster, *German Civil Law*, p. 490), yet a clergyman may refuse to perform such a marriage (20 and 21 Victoria, ch. 85, § 57; Williams, *Inst. of Justinian*[2], p. 25.)

[40] *Code*, 9, 13, 1; *Nov.* 143 and 150.

[41] X (*Decretals of Gregory IX*), 5, 17, ch. 6, 7.

[42] Clark, *Criminal law*, p. 198; 24 *Encycl. Britan.*[11], p. 580.

[43] *Dig.* 23, 2, fragments 59, 60, 62, 64, 66–7; *Dig.* 48, 5, 7, pr.; *Code*, 5, 6.

[44] *Civil code* of Mexico, 170; Argentina, 178.

[45] *Code*, 5, 4, 26.

[46] *Code Theod.* 9, 25, 1 and 2; *Code*, 1, 3, 5; *Nov.* 5, ch. 8; *Nov.* 6, ch. 1, § 7; *Nov.* 123, ch. 14 and 29. This legislation was inaugurated by the sons of Constantine. In pagan times a vestal virgin had to serve 30 years before marrying.

[47] *Code*, 1, 3, 43; *Nov.* 6, ch. 5; *Nov.* 22, ch. 42; *Nov.* 123, ch. 12. This legislation was inaugurated by Justinian. But he permitted a married person to become a priest.

(§ 463) The whole of the persons connected with a common ancestor was called, in Roman law, a *gens*.[48]

Where persons are related in a direct line[49] one from another, this is *lineal relationship*; and they were called, in Roman law, ascendants (parentes) and descendants (liberi) of each other according as the reckoning is made upwards[50] or downwards.[51] The terms "ascendant" and "descendant" are to-day frequently employed in the Modern Codes.[52] Where persons are descended in a collateral line[53] or derive their origin from a common ancestor, this is *collateral relationship*. And they are called collaterals.[54] The Roman degrees of cognation are found in Anglo-American law.[55]

But there was in Roman law a peculiar tie of relationship called agnation (agnatio). All persons subject to the power of the head (paterfamilias) of a family were agnates. Agnation was lineal relationship through the male sex only. For centuries in the Roman law of succession agnation exerted a special influence, but in the law of Justinian it is of no importance at all — cognation is the sole criterion of relationship. Agnatic relationship is not known to modern English law. But traces of it are found in old English law in its preference of the whole blood to the half-blood in successions.[56] Roman law recognized also another kind of relationship produced by adoption, which is *civil* or *fictitious relationship*. For adoption is not based on the blood tie, but is in imitation of natural relationship. Adoption and its fictitious relationship exist widely in modern law.[57]

[48] Cuq, *Institutions juridiques des romains*, vol. i, pp. 30–31.

[49] *Linea recta.*

[50] *Linea superior sive ascendens.*

[51] *Linea inferior sive descendens.*

[52] See for instance the *Civil code* of Spain, 143; France, 148, 746; Louisiana, 903.

[53] *Linea transversa sive obliqua: Dig.* 38, 10, 9; *Dig.* 38, 10, 10, 9.

[54] *Ex latere venientes: Code*, 5, 27, 9, 1; *Nov.* 118, ch. 2 and 3. The modern Latin term is *collaterales.*

[55] See table in Stephen, *Commentaries*, book 2, part 2, ch. 7; and infra §§ 464–5.

[56] See Stephen, *Com.*, book 2, part 1, ch. 9; Maine, *Ancient law*, ch. 5; Williams, *Inst. of Just.*[2], p. 34.

[57] See infra "adoption," §§ 496 et seq.

Degrees of lineal relationship, how computed. The intermarriage of lineal relatives is prohibited. "The nearness of relationship is established by the number of the generations," reads article 20 of the Swiss Civil Code. This reiterates the Roman law as to computing lineal kinship, which was that each generation constitutes a degree, and that the degrees between two or more persons are the number of generations between them. For example, father and son are in the first degree, grandfather and grandson are in the second degree.[58] And both the Canon Law and all modern jurisprudence employ the Roman method for the computation of the degrees of lineal relationship.[59] §464

In both Roman and modern law, marriage is absolutely prohibited between lineal relatives,[60] ascendants or descendants, whether the kinship be the blood tie or fictitious (founded on adoption).[61]

Degrees of collateral relationship, how computed. The intermarriage of distant collateral relatives is permissible. In computing the degrees of collateral relationship, all modern legal systems which follow the Canon Law have parted company with the common-sense Roman method of calculation. Now Roman law, not only in the direct but also in the collateral line, always reckoned the total number of the generations between any two persons whose relationship is to be established. §465

But the Canon Law has introduced the following irrational rule: that between equally distant collaterals the nearness of relationship is the same as that existing between one of them and the common ancestor, and that between unequally distant collaterals it is the same as that between the most remote collateral and the common ancestor.[62] In other words the

[58] See *Dig.* 38, 10, fr. 1, §§ 3–7, fr. 3.

[59] See *Civil code* of France, 735–7; Louisiana, 889–91; Spain, 915–18; Italy, 49–51; Germany, 1589; Robinson, *Elementary law*[2], § 113 (England and United States).

[60] *Inst.* 1, 10, 1; *Dig.* 23, 2, 53, and 55; *Civil code* of France, 161; Louisiana, 94; Spain, 84; Italy, 58; Germany, 1310; Robinson, *Elementary law*[2], § 172 (England and United States).

[61] *Inst.* 1, 10, 1; *Dig.* 23, 2, 55; *Civil code* of France, 348; Spain, 84; Italy, 60; Germany, 1311.

[62] *Decretum Gratiani*, part 2, causa 35, quest. 5, ch. 2.

(§ 465) Canon Law counts the generations of only *one* of the collateral lines if equal, and if unequal, the longest only; while Roman law in every case counts the generations of *both* lines. "The Romans counted up in the ascending, and down again in the collateral line; the Canonists only down, away from the main line." [63] Thus it will be seen that the Canonical computation is not an exact reckoning: it regards two generations as one.

The following examples illustrate the difference between the Roman and Canon methods of computing collateral relationship: Roman law makes brother and sister related in the second degree, while Canon Law places them in the first degree; according to Roman law first cousins are related in the fourth degree, while Canon Law places them in the second degree.

The Roman method of computing the degrees of collateral relationship prevails in most of the modern legal systems.[64] The chief exception is Anglo-American law, which employs the method of the Canon Law.[65]

Roman law finally prohibited the intermarriage of persons related collaterally within the third degree — that is, collateral relatives distant *less* than four degrees.[66] Although during the Early Empire the *intermarriage of uncle and niece* was permitted,[67] yet in the Justinian Roman law it was prohibited — the earlier law being repealed by the sons of Constantine.[68]

In modern law both the older and the final Roman rules are found. For instance, Germany and some of the United States

[63] Colquhoun, *Roman law*, § 622.

[64] See *Civil code* of France, 738; Louisiana, 892; Spain, 918; Italy, 51; Chile, 27.

[65] Blackstone, *Commentaries*, vol. ii, p. 206; Robinson, *Elementary law* [2], § 113.

[66] *Inst.* 1, 10, §§ 2–3, 5; *Dig.* 23, 2, 17. And by the Canon Law collaterals to the fourth degree (reckoned *canonically*) cannot intermarry, — see X (*Decretals of Gregory IX*), 4, 14, 8.

[67] By a senatusconsultum enacted for the benefit of the Emperor Claudius (reigned A.D. 41–54) to enable him to wed his niece Agrippina. See Gaius, 1, 62; Ulpian, *Reg.* 5, 6. This permission was limited to intermarriage with a brother's daughter.

[68] *Code Theod.* 3, 12, 1; *Code*, 5, 4, 17; *Code*, 5, 5, 9; *Inst.* 1, 10, §§ 3–6. The prohibition extended to intermarriage of aunt and nephew.

permit the marriage of uncle and niece.[69] But the law of England, France, Austria, Italy, Spain, and some of the United States forbid the marriage of uncle and niece.[70] (§ 465)

Collaterals distant *beyond* the third degree — that is, related in the fourth or more remote degree — were permitted by Roman law to intermarry.[71] As to the *intermarriage of first cousins* the older Roman rule was that they could not lawfully intermarry.[72] And this is also the Canon Law rule.[73] Spain and Louisiana also forbid such intermarriage.[74]

But in A.D. 405 the long-standing Roman prohibition as to marriages between first cousins was repealed by a statute of Arcadius and Honorius,[75] and thereafter such intermarriage was permitted. And marriage between first cousins was allowable in the law of Justinian.[76] Some of the modern legal systems permit first cousins to marry: for instance the French, German, Italian, and Anglo-American.[77] The intermarriage of first cousins is allowed by the English Common Law.[78] Blackstone, however, claims that this is due to the influence of the Mosaic Levitical law on English law[79]: but this seems rather exhibitive of Common Law prejudice against the Civil Law of Rome.

[69] Schuster, *Principles of German Civil Law*, pp. 490–91 (note 18); *Civil code* of Germany, 1310; Robinson, *Elementary law*[2], § 172. The permission usually extends to aunt and nephew.

[70] Schuster, *Id.; Civil code* of France, 163; Austria, 65; Italy, 59; Spain, 84; Robinson, *Id.*

[71] *Inst.* 1, 10, 4.

[72] Ulpian, *Reg.* 5, 6; *Code Theod.* 3, 10, 1; *Code Theod.* 3, 12, 3. The older Roman rule did well to prohibit marriages between first cousins, from an eugenic point of view.

[73] Williams, *Inst. of Justinian*[2], p. 23.

[74] *Civil code* of Spain, 84; Louisiana, 95 (as amended in 1902).

[75] *Code*, 5, 4, 19.

[76] *Inst.* 1, 10, 4.

[77] *Civil code* of France, 162–3; Germany, 1310, 1589; Italy, 59; Williams, *Inst. of Justinian*[2], p. 23; Terry, *Common Law*, § 970.

[78] See the preceding note. But in the United States this matter is now generally settled by statutes of the states.

[79] *Commentaries*, vol. i, p. 435 note.

§466 **Impediments to marriage: (3) affinity.** Relatives by affinity (affinitas) are persons connected by marriage.[80] Affinity is the connection between one of the spouses and the blood relatives of the other.[81] This Roman conception has descended into Anglo-American law: "A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband," to quote from a recent Michigan decision.[82] Affinity is applicable also to step-relationship, where one step-relative is the husband or wife of another's blood relative.[83]

There are no degrees in affinity.[84] But it is customary to denote nearness of affinity by degrees[85]: as a person is related by blood to one of a married pair, so he is related by affinity in the same degree to the other spouse.

Affinity in the direct line was sternly declared by the pagan Emperors to be an impediment to contracting marriage.[86] Affinity in the collateral line, between brother-in-law and sister-in-law, was equally as sternly declared by Christian Emperors to be an impediment to marriage; and such marriages were regarded as incestuous.[87] Affinity in both lineal and collateral lines is to-day an impediment to marriage in many modern legal systems: for instance the law of England, France, Germany, Italy, Spain, Austria, Chile, and Mexico.[88]

[80] Or its equivalent: (1) *concubinage*, a quasi-marriage (see *Code*, 5, 4, 4, and infra § 483); (2) *contubernium* or the 'marriage' of slaves (*Dig.* 23, 2, 14, 3).

[81] *Dig.* 38, 10, 4, 3.

[82] *Bliss* v. *Tyler*, 113 N. W. p. 319. See also 1 Bouvier, *Law dict.*, p. 1112; 1 *Am. and Eng. Encycl. of Law*, p. 911; 2 *Cyc.* p. 38; 23 *Cyc.* p. 583; 24 *Cyc.* p. 274; 1 *Words and phrases judic. def.* p. 245.

[83] Mackeldey (Dropsie), *Roman law*[14], § 148, Step-parents and step-children are related by affinity; but no affinity exists between step-brothers and step-sisters.

[84] *Dig.* 38, 10, 4, 5.

[85] *Dig.* 38, 10, 10, pr.

[86] *Gaius*, 1, 63; *Inst.* 1, 10, 6 and 7; *Dig.* 23, 2, 14, 4; *Dig.* 38, 10, 4, §§ 5–7; *Code*, 5, 4, 17.

[87] *Code Theod.* 3, 12, 2, and 4; *Code*, 5, 5, leges 5, 8, 9; *Inst.* 1, 10, 9 and 12; *Dig.* 23, 2, 15.

[88] Williams, *Inst. of Justinian*[2], p. 23 and Terry, *Common Law*, § 970 (it was made so by statute, not by the Common Law); *Civil code* of France,

All impediments by affinity are abolished by the Louisiana Code,[89] and generally do not prevail at all in the United States.[90]

Among the Roman prohibitions of marriage because of affinity were the following: a man cannot marry his brother's widow,[91] or his deceased wife's sister.[92] This prohibition as to marriage with a deceased wife's sister was also law in England for centuries until the year 1907, when it was abolished.[93]

B. PUBERTY

§ 467

The age required for marriage. In order to marry, men must be 14 and women 12 years of age.[94] These ages of puberty (pubertas) were fixed by Justinian. The older Roman rule was to inspect the physical development of the body.[95]

The finally settled Roman rule of 14 years for men and 12 for women is found in modern law, for instance in Spanish, Mexican, and Anglo-American law.[96] By French and Italian law men must be 19 and women 16 years of age in order to marry.[97] Japanese law is the same as the French concerning women, but allows men to marry at 18 years of age.[98] German law requires that men must be 22 and women 17 in order to marry.[99] By Swiss law men must be 20 and women 18 years of age.[100]

161; Germany, 1310; Italy, 53; Spain, 84; Austria, 66; Chile, 104; Mexico, 159.

[89] Art. 96.

[90] Terry, *Common Law*, § 970.

[91] *Code Theod.* 3, 12, 2, and 4; *Code*, 5, 5, 5.

[92] *Id.*

[93] See *Deceased Wife's Sister Act of 1907*.

[94] *Code*, 5, 60, 3; *Inst.* 1, 22, pr. The Proculian school of Roman jurists (supra vol. i, § 74) had fixed puberty at 14 years, — see footnote immediately following.

[95] Gaius, 1, 196; Ulpian, *Reg.* 11, 28. This was the rule of the Sabinian school of Roman jurists (see supra vol. i, § 74).

[96] *Civil code* of Spain, 83; Mexico, 160; Blackstone, *Commentaries*, vol. i, p. 436; Robinson, *Elementary law*[2], §172. But the statutes of American states generally have raised this age.

[97] *Civil code* of France, 144; Italy, 55.

[98] *Civil code* of Japan, 765.

[99] *Civil code* of Germany, 1303.

[100] *Civil code* of Switzerland, 96.

C. CONSENT

§468 **The parties whose consent is necessary for a valid marriage.** The consent indispensable to marriage meant in Roman law not only that of the contracting parties themselves,[101] but also that of their respective heads of families.[102] If the future husband was a grandson subject to the paternal power of his grandfather, he was required to obtain the consent of his own father (also in power).[103]

If the head of the family was insane or a prisoner of war in a foreign country, his consent was not necessary.[104] If consent was refused on irrational grounds, the local court could dispense with it and allow the marriage.[105] If a person was under guardianship, his or her guardian's consent was necessary.[106] And such is the rule also in modern law: for instance that of Austria.[107]

Consent in Roman law was sufficiently manifested by leading the bride to the husband's house.[108] Where this *deductio ad domum* occurred, marriage might be contracted even between parties one of whom was absent.[109] Marriage by proxy (*inter absentes*) is allowable in Spanish and Austrian law[110]; but is not permitted in French, German, Italian, and Anglo-American law.[111]

[101] *Dig.* 23, 2, 21; *Code*, 5, 4, 14.

[102] *Dig.* 23, 2, 2; *Inst.* 1, 10, pr. But an emancipated child did not need the parental consent, — *Dig.* 23, 2, 25.

[103] *Dig.* 23, 2, 16, 1. See also *Inst.* 1, 11, 7: "ne ei invito suus heres agnascatur" (no one shall become heir to a man against his will).

[104] If insane: *Inst.* 1, 10, pr.; *Code*, 1, 4, 28; *Code*, 5, 4, 25. If a prisoner of war: *Dig.* 23, 2, 9, 1.

[105] *Dig.* 23, 2, 19.

[106] Girard, *Manuel de droit romain*[5], p. 155, note 2. See also Cicero, *Pro Flacco*, 34; Livy, 4, 9; Ulpian, *Reg.* 11, 22; *Code*, 5, 4, 1.

[107] *Civil code* of Austria, 245.

[108] *Dig.* 23, 2, 5; *Code*, 5, 3, 6; Hunter, *Roman law*[4], p. 682.

[109] *Dig.* 23, 2, 5.

[110] *Civil code* of Spain, 87; Austria, 76.

[111] *Civil code* of France, 165; Germany, 1317–18; Italy, 93, 97; 6 and 7 William IV, ch. 85; Williams, *Inst. of Justinian*[2], p. 22.

In modern law parental authority ceases at majority.[112] And children over the age of majority may marry without regard to parental approval. But as to the marriage of minors[113] there are still traces of the Roman rule of making paternal consent a prerequisite thereto, the chief difference being that modern law has usually widened "paternal" consent into "parental." For instance, by the law of France, Germany, Italy, Spain, and Louisiana paternal or parental consent is indispensable to the marriage of a minor.[114] If parental consent cannot be obtained, the modern Continental European law usually provides that it may be secured from a Family Council or Guardianship Court.[115]

The Canon Law, which is in the absence of statute the law of England governing marriages,[116] abolished the paternal power (patria potestas) of the Roman law as to the marriage of children, and introduced this qualification to the Roman rule: that the consent of parents is not naturally requisite; if this consent is not obtained, it is a violation of parental duty but not a ground for annulling the marriage. This is the rule of Anglo-American law.[117] But in the United States the tendency of state legislation is now to require parental consent to the marriage of a minor, thus reverting to the sound and wise rule of the Roman law. The English and American religious marriage ceremonies, wherein the bride is given away, are a relic of the paternal power in Anglo-American law.

(3) Roman Conceptions of Marriage

The two opposite conceptions of marriage successively prevailing in Roman law. Two opposite conceptions of § 469

[112] See supra §§ 446–7 et seq., and infra "paternal power," §§ 505 et seq. Persons who have attained their majority must consent to marriage *voluntarily* and not through duress or fraud: see for instance *Civil code* of Germany, 1335; Robinson, *Elementary law*[2], § 172.

[113] Supra § 447.

[114] *Civil code* of France, 148; Germany, 1305; Italy, 63–4; Spain, 45; Louisiana, 97.

[115] See preceding note, and *Civil Code* of Germany, 1308.

[116] *Sherwood* v. *Ray*, 1 Moore, Privy Council Cases, p. 353; Williams, *Inst. of Justinian*[2], p. 22.

[117] *R.* v. *Birmingham*, 8 B. and C. 29.

marriage successively prevailed in Roman law: marriage with marital power (*manus*), in Ancient Roman law; marriage without marital power, in Imperial Roman law.

The history of the Roman law of marriage reveals three well-defined phases: marriage involving the marital power of the husband over the wife — the sole kind of marriage in very Ancient Roman law; the coexistence of marriage, with and without marital power — this situation appeared as early as the Law of the XII Tables[118]; the disappearance of marriage involving the marital power and the prevalence of "free" marriage without any marital power — by the 2d century A.D. marriage with marital power had fallen into desuetude, and by the 4th century it had ceased to exist.

A. MARRIAGE WITH MARITAL POWER (CUM MANU)

§ 470 **Nature of marriage involving marital power. The three forms of marriage with marital power.** The ancient Roman law for citizens (jus civile) made marriage a despotic relationship, wherein the wife always lost her status possessed when single and was transferred from the power (potestas) of her father or head of her family to the power (manus) of her husband. This was known as marriage with manus.

By its operation the wife became her husband's agnate[119] and was regarded as if his daughter[120]; she was legally considered as if a sister to her own children.[121] All the property of the wife was absorbed in that of her husband.[122] But correlatively the husband had to support her. This early Roman conception of marriage has been repeated to some extent in the English Common Law, which originally regarded husband and wife as one and that one the husband, and which did not allow the wife to have separate property or civil rights.

[118] Enacted 450–449 B.C. See supra vol. i, § 37.

[119] Explained supra § 463.

[120] "Uxor in manu viri . . . placuit eam filiae jura nancisci," — Gaius 1, 115b. "Quia filiae loco est," — *Collatio Mos. et Rom.* 16, 2, 3.

[121] Hence she was one of the husband's heirs, and could inherit from him: "Uxor quoque quae in manu viri est ei sua heres est," — *Collatio, etc.*, id.

[122] Gaius 3, 82; Gaius 2, 86; Ulpian, *Reg.* 19, 18.

Marriage with marital power was almost obsolete in the time of Gaius,[123] and four centuries later it is not found at all in Justinianean Roman law. There were three forms of marriage with the marital power: confarreatio, co-emptio, usus.[124]

§ 471 **1. Confarreatio.** This was a religious form of marriage with manus. By confarreatio — a religious ceremony and perhaps the earliest form of marriage cum manu — the subjection of the wife was hallowed by religion.[125] Through confarreatio she became transferred from the priestly power of her father to the priestly power of her husband. This kind of marriage was open to the patricians only. By the middle of the 2d century A.D. confarreatio had survived only for a limited purpose: to qualify a Roman for high priestly office[126] his parents must have been thus married. Confarreatio utterly disappeared after the triumph of Christianity in the 4th century, and is not even mentioned in Justinianean Roman law.

§ 472 **2. Co-emptio.** The baser origin of the Roman manus is shown by co-emptio, which was a non-religious affair (often called plebeian marriage because open to this class of citizens) and consisted in the sale of the woman to the husband by the same form as if she were a slave.[127] This sale had to be followed by delivery just as if the wife were property. But if the conveyance was bad, no marital power could be created even in spite of the delivery, until the usual period of prescription[128] had passed, so thoroughly was the wife assimilated to property.

Perhaps co-emptio was a sort of survival from the era of the "Rape of the Sabine women," but substituting purchase and

[123] Poste, *Gaius* [4], p. 69. Gaius died after c. A.D. 180,— see supra vol. i, § 86.

[124] Gaius, 1, 110.

[125] Gaius, 1, 112; Poste, *Gaius* [4], p. 69.

[126] For instance, *flamines diales* (priests of Jupiter), Gaius, 1, 112. See also Tacitus, *Annals*, 4, 16.

[127] By *mancipatio*, — Gaius, 1, 113; Poste, *Gaius* [4], pp. 70–1.

[128] As to taking title to property by adverse possession, see infra "prescription," § 648.

sale for capturing wives by violence.[129] Co-emptio was getting obsolete in Gaius' time, and it is not even mentioned in Justinianean Roman law.

§473 3. **Usus.** By taking advantage of the circumstance of a faulty mancipatio,[130] the Romans succeeded finally in getting rid of the marital power. The husband could gain title to the wife by prescription, provided his adverse possession was continuous for a year.[131] And also the husband obtained marital power and the marriage was a lawful one where he lived for a year with a woman capable of being married by confarreatio or co-emptio.

But in any case of such cohabitation, if the wife absented herself for three nights during the year,[132] the usus was avoided and the prescription was broken and ruined. All the husband could do was to start in again; perhaps he never succeeded. The marriage was not avoided, — only the marital power was prevented. Usus was a sort of 'trial' marriage from the viewpoint of the acquisition of marital power by the husband. If he did not suit his wife for a year, she avoided subjection to his power, although a lawful wife. Usus was largely obsolete in the time of Gaius,[133] and it is not found in Justinianean Roman law.

B. MARRIAGE WITHOUT MARITAL POWER (SINE MANU)

§474 **Nature of "free" marriage not involving marital power.** Gradually the idea arose during the Later Republic and the Early Empire that marriage ought not to carry with it any marital power; that the wife ought not to suffer any change of status but should remain as she was prior to marriage[134] —

[129] See Hunter, *Roman law* [4], p. 227.

[130] Defined infra § 570.

[131] Gaius, 1, 111; Ulpian, *Reg.*, 19, 8 (one year was the period for movable property).

[132] The *usurpatio trinoctii*.

[133] Gaius, 1, 111.

[134] Inasmuch as no marital power followed, the wife remaining in her paternal family was called *uxor* and not *materfamilias* (a name *originally* reserved for a wife married with marital power, — Aulus Gellius, *Noctae Atticae*, 18, 61.

in other words, she should be as free as the husband in regard to status. This later Roman conception of marriage predicated the legal equality of the married pair, and is often termed by modern Civilians "free" marriage. (§ 474)

Roman marriage according to this final conception of it was simply a contract, the essence of which was consent, and presumably for life, although divorce was permitted.[135] And this is the theory of marriage in the Justinian Roman law. It was one of the products of equity in Roman law worked out through the medium of the jus gentium. Marriage was no longer considered a despotic relationship. Tyranny over the wife was regarded as unjust. The spouses became legally independent of each other. Finally, this Roman conception of "free" marriage and the consequent legal independence of the spouses was carried to the extent of keeping their property separate even after the death of either of them. There was no right of succession as such in Roman law between husband and wife, unless there were no relatives.[136]

Approximating this is the modern progressive conception of the relation of husband and wife to-day in the United States. The greater part of the Anglo-American law of marriage is derived from the Civil or Canon Law,[137] the latter being Roman law at secondhand.[138] Blackstone himself says that as to marriage "the Common lawyers have borrowed especially in ancient times almost all their notion of the legitimacy of marriage from the Canon or Civil Laws."[139] And the old English Common Law rule that husband and wife are generally to be regarded as one person[140] is fast disappearing in the United States by an evolutionary return to the Roman law rule that they are two distinct persons.[141]

[135] Infra §§ 484 et seq.

[136] Even a very remote relative would suffice to the succession of a spouse. But Justinian changed this long-standing rule by giving a widow in destitute circumstances a small portion of the husband's estate, — *Nov.* 117, 5 (repealing Nov. 53, 6). See infra "intestate succession," § 676.

[137] Scrutton, *Roman law in England*, p. 166.

[138] See vol. i, §§ 225 et seq.

[139] *Com.* vol. i, pp. 434; see also *Id.* pp. 436–8, 444.

[140] Blackstone, *Id.* vol. i, p. 444.

[141] See Robinson, *Am. jurisprudence*, § 43.

In order to rebut the presumption of concubinage,[142] it became customary for the Romans to draw up a marriage contract or settlement.[143] Yet by a late statute of Justinian's reign the use of instrumentalia dotalia was not made compulsory, except for the highest officers of State.[144] "Free" marriage was often inferred by various presumptions: for instance if the parties were of the same rank it was justae nuptiae, if not, concubinage.[145]

§ 475 **No special form was prescribed for marriage without marital power; but a manifestation of mutual consent was indispensable.** For the inauguration of marriage without marital power the Roman law prescribed no form: marriage was contracted by an expression of consent,[146] although it was usual to have some pomp and ceremony at weddings.[147] Two centuries after Justinian an ecclesiastical benediction became necessary, and marriage became treated as a sacrament of the Church by the law of the Byzantine or Eastern Roman Empire.[148] The Council of Trent made a similar decree in 1563 for Catholic Western Europe.

Modern law has finally reverted to the Roman doctrine that marriage is a mutual contract, the essence of which is the simple consent of the parties. "A civil contract," and "must be freely consented to," reads the Louisiana Civil Code.[149] "There is no marriage where there is no consent," declares the French Code.[150] But the fact that Roman law laid the emphasis on consent as the basis itself of marriage (or, to employ the celebrated maxim of Ulpian, "consent, not

[142] See infra § 483.

[143] See infra § 478; Amos, *Roman law*, p. 278.

[144] Particularly the class known as *illustres*, — *Nov.* 117, 4.

[145] Such was the Roman law down to the time of the Emperor Justin, uncle of Justinian. From the statute of Justin, who changed the law to enable his nephew to marry Theodora, a woman of low and shameful station, marriage was always presumed: see *Code*, 5, 4, 23, 1; supra § 462.

[146] See supra § 468.

[147] "Pompa etiam nuptiarum celebritas," — *Code*, 5, 4, 22. "Festivitas nuptiarum," — *Code*, 5, 4, 24.

[148] See vol. i, §§ 174, 150.

[149] Art. 86, 92.

[150] Art. 146.

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physical intercourse, makes a marriage" [151]) must not be taken to prove that the form of marriage is of no importance: Justinian's Institutes hold that marriage is contracted *only* when it is performed according to law.[152]

The doctrine of Roman law making consent the essence of marriage will throw some light on the "common-law marriages" of Anglo-American law, where there is no formal marriage ceremony. But generally now by statute in the United States a marriage must be celebrated before some ecclesiastical or civil officer.[153] In England for nearly three centuries from the Council of Trent to 1836 the presence of a priest in orders was necessary; since 1836 parties may marry before a civil officer.[154]

The proprietary relations of husband and wife in marriage without marital power. Each spouse retained his or her own property. The wife's property remained her separate property subject to her own control.[155] Only one restriction on the proprietary rights of women is found in Justinianean Roman law and this was due to motives of public policy: by a statute enacted in the reign of the Emperor Claudius, no woman, married or single, could act as a surety.[156] §47

Inasmuch as the wife continued to be a member of her father's family [157] and normally remained subject to his power, an interesting question is raised: did the later Roman

[151] *Dig.* 50, 17, 30.

[152] *Inst.* 1, 10, pr.

[153] Terry, *Common law*, § 971.

[154] Williams, *Inst. of Justinian* [2], p. 22.

[155] Where the source of the wife's property is in doubt, it was presumed, until the contrary is proved, that such property came from the husband as a gift to the wife (the so-called *praesumptio Muciana*), — *Dig.* 24, 1, 51; *Code*, 5, 16, 6.

[156] The *SC. Velleianum* (A.D. 46); *Dig.* 16, 1, 2, pr., and §§ 4–5; *Dig.* 6, 1, 40; *Dig.* 16, 1, fragm. 32, § 1; fragm. 27, § 1. See also infra "contracts, suretyship," § 769. The Velleian was followed for a long time in medieval French law, but is not found in the Code Napoleon, — Brissaud (Howell), *History of French private law*, pp. 165, 171, 228, 499, 573, 787, 804. But it still partly lingers in South Africa and Scotland, — Williams, *Inst. of Justinian* [2], p. 195.

[157] See supra § 474, note: her original title was *uxor* and not *materfamilias*.

conception of marriage sine manu push the legal independence of the married pair to this extreme limit — that the husband was under no obligation to support his wife? There is some uncertainty owing to the absence of an explicit Roman text on this point. But the better inference is that he must maintain her.[158] And such is the rule of Anglo-American law.[159] Nevertheless there are Roman law decisions which have been construed to hold that the husband was under no obligation to support his wife, unless a dowry (dos [160]) had been provided for her maintenance.[161] To avoid difficulties and for the sake of preciseness the proprietary relations of husband and wife were frequently arranged before marriage.

§477 1. **Gifts between husband and wife during marriage were prohibited.** By the 3d century A.D., when the later Roman conception of marriage thoroughly prevailed, gifts between husband and wife during marriage — originally unrestricted [162] — were prohibited.[163] The only way husband and wife could make gifts to each other was to do so *before* marriage.[164] And this remained the rule of Roman law, until Justinian broke in upon it by allowing gifts in favor of marriage (dos and donatio propter nuptias) to be established *after* marriage.[165]

The reason for holding such gifts absolutely void was a consequence of this later Roman idea of "free" marriage, which applied strictly the principle of separate property for

[158] "Quia ipse onera matrimonii sustinet," — *Dig.* 10, 2, 20, 2; *Dig.* 10, 2, 46; *Dig.* 23, 3, 7 and 56. This is also the view of Mackeldey (Dropsie), *Roman law* [14], § 560, and Sohm (Ledlie [3]), *Roman law*, p. 465.

[159] Robinson, *Elementary law* [2], § 176.

[160] See infra § 478.

[161] These texts relate to the liability of the husband for the funeral expenses of the wife, holding that the wife's dowry — and if none, her father or his heirs — are liable for the funeral *before* the husband becomes liable: *Code*, 2, 18, 13 (A.D. 230); *Dig.* 11, 7, fragm. 22 and 28. See also *Dig.* 24, 3, 22, 8. Hunter, *Roman law* [4], p. 679, and Morey, *Roman law*, p. 248, hold this view.

[162] Prior to the *lex Cincia de donis* (204 B.C.). And this statute expressly excepts from its scope husband and wife: *Vat. Fragm.* § 298.

[163] *Dig.* 24, 1, 1 and 3 pr.; *Code*, 5, 16, 4; *Dig.* 24, 1, 32, pr. and §§ 1–2.

[164] See infra §§ 478–9.

[165] *Id.*

each of the pair and so prohibited them from depriving themselves of their resources by foolish generosity; as the Emperor Antoninus himself put it, the object of marriage is the satisfaction of an honorable love and not that either husband or wife should gain money by it.[166]

In the English Common Law prohibitions of conjugal donations and the introduction of curtesy "we have substantial effects of Roman influence on English law." [167] It is quite possible that curtesy, the life-tenancy of the husband if issue has been born alive, may be an application of the Emperor Constantine's rule as to *bona adventicia*.[168] In modern Continental European jurisprudence and allied systems of law, gifts between husband and wife during marriage are either restricted or forbidden.[169]

2. Dowry (dos). To assist in meeting the household expenses the bride was given a marriage portion [170] — usually by her father, although some third person or even the bride herself might furnish it.[171] The father was compelled to do so if he could.[172] It was finally settled that dos may be constituted or increased *after* marriage.[173] § 478

[166] *Dig.* 24, 1, 3, pr. But gifts mortis causa (infra § 660) were permitted between the spouses: *Dig.* 24, 1, 10.

[167] Wright, *Tenures*, p. 194. "Craig . . . deduces curtesy from one of the rescripts of the Emperor Constantine," — Kent, *Comm.* vol. iv, p. 28.

[168] See *Code*, 6, 60, 1; infra "paternal power," § 512.

[169] *Civil code* of France, 1096; Italy, 1054; Spain, 1334; Chile, 1788; Louisiana, 1749.

[170] It was not only called *dos* but also *res uxoria*. That there could be a real *dos* in a marriage *cum manu* (supra §§ 470 et seq.) is very doubtful: see Cicero, *Top.* ch. 4; *Fragm. Vat.* § 115.

[171] If the paterfamilias furnished the *dos*, it was called *profecticia;* if furnished by any other person, it was known as *adventicia*. If the constitutor reserved the right to reclaim it, such dowry was called *dos recepticia*. See Ulpian, *Reg.* 6, §§ 3–5, *Dig.* 23, 3, 5; *Code*, 5, 13, 1.

[172] By the *lex Julia et Papia Poppaea* (A.D. 9). See Amos, *Roman law*, p. 290; Hunter, *Introduction to Roman law* [6], p. 35.

[173] *Vat. Fragm.* § 110; *Code*, 5, 13, 19 (Justin). This is also possible in modern German law: *Civil code*, 1432. As to the necessity, in Roman law, of recording the dos (a gift inter vivos), see infra § 480, note.

(§ 478) In the law of Justinian all the right the husband had in the property of the dowry was its use [174] until the termination of the marriage (whether by death or divorce), when the dotal property reverted to the constitutor of the dos or to whosoever was entitled to receive it. And the husband was obliged to return it, even in the absence of any express agreement to return.[175] Under no circumstances did the dowry become the husband's property,[176] and he was forbidden by Justinian to even make a profit out of its management.[177] Thus was finally reduced to a shadow the original right of the husband as owner of the dowry under the older Roman law.[178] Justinian assured the return of the dos by making

[174] *Usufruct*, technically speaking, — Sohm (Ledlie [3]), *Roman law*, p. 472. Usufruct is discussed infra under "servitudes," § 586.

[175] This obligation of the husband began to be enforced as early as 200 B.C. by the praetor granting the *actio rei uxoriae*, wherein the plaintiff seeking the recovery of the dos demanded "quod melius aequius erit" (Cicero, *Top.* 17, 66). Justinian fused this action with the right to sue for a return of the dos based on express agreement (*actio ex stipulatu*) and gave to the new statutory action the name of the latter, making the obligation of the husband to return thoroughly enforceable: *Code*, 5, 13, 1, pr., § 1, § 6; Mackeldey (Dropsie), *Roman law* [14], §§ 568–70.

[176] By a statute of Augustus (the *lex Julia de adulteriis et de fundo dotali*) the husband could not sell or mortgage dotal lands even with the consent of the wife: see Gaius, 2, 63; *Inst.* 2, 8, pr.; *Dig.* 16, 1 pr. and § 1. Nor could he burden them with an easement or servitude, nor release them from such burden: *Dig.* 23, 5, 5 and 6.

[177] *Nov.* 98.

[178] Gaius 2, 62–3; *Inst.* 2, 8, pr.; *Dig.* 23, 3, fragm. 7, 3; fragm. 75; *Dig.* 50, 1, 21, 3; *Code*, 5, 12, 23. All these authorities hold that the husband is *dominus dotis*. And the husband, not the wife, is entitled to bring a *vindicatio* to recover ownership: *Code*, 5, 12, 11; *Code*, 3, 32, 9. But Justinian altered the law, stating that the property really remained the wife's during the marriage: *Code*, 5, 12, 30. The whole question of just what was the right of the husband over the dos has been greatly controverted, and there are three views: (1) the ancient view was that the husband enjoys the use of the dos by virtue of having the *dominium civile*, although the wife has the *dominium naturale* (suspended during the marriage), — Thibaut, *Pandekten*, §§ 447, 448; (2) Cujas held that the husband always becomes the sole owner, subject to the claim of the wife for the future restoration of the dos, — *Observat*, 10, ch. 32; (3) Doneau held that the wife continues to be owner, and the husband acquires only the usufruct and management of the dos, — *Comm. jur. civ.* 14, ch. 4. This is Justinian's settlement of the question.

such right a lien or hypothec[179] on the property of the husband superior to the right of any creditor.[180]

The Roman dotal régime has survived in many modern legal systems, especially those of Continental Europe and derived systems.[181] The influence of dos[182] on the marriage settlements in England has been considerable. But the marriage settlement of English law thus differs from the Roman: the English settlement generally gives an interest in the property to the offspring of the marriage, but the Roman did not.[183]

3. Gift on account of marriage (donatio propter nuptias — originally called donatio ante nuptias), or marriage settlement by the husband. Early during the Later Empire there was developed a gift from husband to the wife correlative to dowry.[184] It is first mentioned definitely in a 5th century statute[185] of Theodosius II. § 479

Corresponding to the obligation of the head of the wife's family to contribute if possible a dowry,[186] was the duty of the head of the husband's family to contribute if possible a marriage gift which, like dos, was to be employed for marriage expenses.[187] And Justinian enacted that the husband's gift must be equal in amount to the wife's dowry.[188] This marriage settlement by the husband was regarded as really of the same nature as dos[189]; and consequently almost all the rules relating to the latter became extended to it.[190]

[179] See infra "hypotheca," § 615.

[180] *Code*, 5, 13, 1, 1b; *Code*, 5, 12, 30; *Code*, 8, 17, 12, 1. The earlier assurance for the return had been a *privilegium*, — *Dig.* 42, 5, 17, 1.

[181] See for instance the *Civil code* of France, 1540–73; Italy, 1388–1424; Spain, 1336–80; Mexico, 2119–2218; Louisiana, 2337–82.

[182] And also of *donatio ante* or *propter nuptias* (infra § 479).

[183] See Hunter, *Introd. to Roman law*[6], p. 37.

[184] Supra § 478. But dos is of immensely greater antiquity.

[185] *Code*, 5, 3, 17.

[186] Supra § 478.

[187] *Code*, 5, 11, 7.

[188] *Nov.* 97, ch. 1 and 2. See also *Nov.* 22, 20; *Nov.* 98, 2.

[189] *Code*, 5, 3, 20, pr. The name *antipherna* given to it in *Code*, 5, 3, 20, 2, means *antidos* (the correlative of dos).

[190] For instance the husband could not sell or mortgage lands embraced in his marriage settlement gift even with the consent of the wife: *Code*,

(§ 479) Originally the husband's gift had to be made before marriage, as its old name of *donatio ante nuptias* indicates; but the Emperor Justin allowed it to be increased during marriage [191]; and Justinian himself altered the earlier law still more by permitting this gift to be made even after marriage.[192] Then, because its old name had become a misnomer, Justinian gave the husband's gift the new and appropriate name of *donatio propter nuptias*.[193] This gift might have to be recorded.[194]

If the wife survived the husband and there was issue, she had a life-use [195] of the donatio propter nuptias and shared its ownership with her children: but if there were no issue, it passed to his heirs, in the absence of a special agreement to the contrary.[196] To obtain the donatio propter nuptias if she became entitled to it, Justinian gave the wife a lien or hypothec on all the property of the husband.[197] But whatever rights the widow had in the donatio propter nuptias, she forfeited if she remarried within a year (infra annum luctus) after the husband's death or had a child during the first year of widowhood.[198]

If the marriage was dissolved by the divorce of the husband through his own fault, the husband was penalized by losing the donatio propter nuptias, which passed to the wife.[199] But if the marriage was terminated by the divorce of the wife

5, 12, 29; *Nov.* 61, ch. 1; *Nov.* 97, ch. 6. And the husband has the management of this gift. The influence of donatio propter nuptias on marriage settlements in England has already been considered, — supra § 478.

[191] *Inst.* 2, 7, 3; *Code*, 5, 3, 19.

[192] *Inst.* 2, 7, 3; *Code*, 5, 3, 20.

[193] *Inst.* 2, 7, 3.

[194] *Insinuatio* was required by the Justinian law as to all gifts inter vivos in excess of 500 *solidi* (approximately $1,200): *Inst.* 2, 7, 2; *Code*, 8, 53 (54), 34–7; *Nov.* 52, ch. 2. As to the necessity of recording donationes propter nuptias, see infra § 659.

[195] *Usufruct.*

[196] Moyle, *Institutes of Justinian*, vol. i, 5th ed. p. 236; Mackeldey (Dropsie), *Roman law*[14], p. 431.

[197] *Code*, 5, 12, 29. See *Nov.* 61, 1.

[198] *Code*, 5, 9, 2; *Nov.* 39, 2. See infra § 482.

[199] *Code*, 5, 17, 8, 7; *Code*, 5, 17, 11; *Nov.* 22, ch. 8, 9, 18; *Nov.* 53, 6; *Nov.* 117, ch. 9, §§ 4 and 5, and ch. 13; Mackeldey (Dropsie), *Roman law*[14], § 579.

through her own fault, or by the death of the wife, the donatio propter nuptias reverted to the husband or to the constitutor.[200] The Roman gift on account of marriage has exercised some influence on modern law.[201]

4. Parapherna. All other property of the wife not comprised in the dos or donatio propter nuptias [202] was known as parapherna. The husband had no rights at all over the wife's bona paraphernalia,[203] except what she had granted to him — for instance to act as agent in managing her property.[204] §480

The Roman parapherna have descended into modern law. For instance in French, Italian, Spanish, and Louisiana law paraphernal property is extra-dotal effects.[205] The English law of paraphernalia is "borrowed from the Civil Law," says Blackstone.[206]

Controversy as to the origin of the community system of marriage. Very widespread has been the partnership régime of marriage known as "community," wherein the property of husband and wife acquired *during* marriage form but one mass of common effects subject to be divided into two equal portions at the dissolution of the marriage. In France this conjugal community system, which was originally manifested in a few of the northern provinces [207] and later was restricted to the provinces of customary law,[208] finally has become the common matrimonial régime for the whole of France.[209] The §481

[200] *Code*, 5, 3, 18; *Code*, 5, 12, 31, 3 (1); *Code*, 5, 17, 8, 3; *Nov.* 22, ch. 20, § 1.

[201] See *Civil code* of Spain, 1327 et seq.; supra § 478 (marriage settlements in the law of England).

[202] Supra §§ 477, 478.

[203] *Code*, 5, 14, 8 and 11.

[204] *Dig.* 23, 3, 9, 3; *Dig.* 35, 2, 95; *Code*, 5, 14, 11; *Code*, 2, 12 (13), 21.

[205] *Civil code* of France, 1574–80; Italy, 1425–32; Spain, 1381–91; Louisiana 2383–91.

[207] *Commentaries*, vol. ii, p. 436. The Common Law paraphernalia is, however, a rather emasculated affair, signifying merely the wearing apparel and ornaments of the wife.

[207] Brissaud (Howell), *French private law*, p. 882.

[208] See vol. i, § 239.

[209] *Civil code* of France, 1392, 1399, 1400; Brissaud, *Id.*, p. 815.

(§ 481) conjugal community is found also in Spain.[210] From the combined sources of French and Spanish law, the community has descended into Louisiana.[211] Moreover through the Spanish channel the matrimonial régime of community penetrated Central and South America,[212] particularly Mexico of which Texas and California were originally provinces.[213] And this system of partnership marriage is found to-day not only in these two American states, but also in Arizona, New Mexico, Nevada, Idaho, and Washington.[214]

The origin of the community matrimonial régime is disputed. Quite supportable is the older opinion that the origin of the community is Roman.[215] And this view has been recently revived.[216] But the prevalent modern opinion gives

[210] *Civil code*, 1392. The matrimonial community has been manifested also in Belgium, Holland, Denmark, some parts of Germany, Switzerland, and Portugal, — Brissaud, *Id.* p. 822.

[211] *Civil code*, 2399, 2402; supra vol. i, §§ 263, 309. In Florida, Arkansas, Mississippi, and Missouri the community has been replaced by the English Common Law of marriage.

[212] See supra vol. i, §§ 299, 307.

[213] *Id.* § 309.

[214] Loewy, *Spanish community of acquests and gains*, 1 Cal. Law Rev., pp. 32–45; *In re Lux's Estate*, 114 Cal. 73; *Civil code* of California, 687; *Mitchell* v. *Mitchell*, 80 Tex. 101; *Holyoke* v. *Jackson*, 3 Wash. T. 235.

[215] For husband and wife to contract a partnership of possessions between themselves was allowable, although not common: "societatem omnium bonorum," *Dig.* 34, 1, 16, 3; "consortium omnis vitae" (is the community referable to this definition of marriage by Modestinus?), *Dig.* 23, 2, 1; "mulier . . . sicuti cum socia," *Dig.* 24, 3, 17, 1; "quia societas vitae," *Dig.* 25, 2, 1; "uxorem, quae socia," *Code*, 9, 32, 4; Girard, *Textes*[3], p. 777 (*Laudatio Turiae*, where husband and wife take care of one another's possessions). Moreover the system of community of property between spouses is found in post-Justinian or Byzantine Roman law of the 8th century (*Ecloga*, title 2, where the surviving husband or wife retains all the possessions of the deceased spouse, provided there are children), In Greek law a partnership matrimonial régime was also possible: Beauchet, *Droit privé de la répub. athén.*, vol. i, p. 244.

[216] Van Wetter, *Le droit romain et le droit celtique — la communauté des biens entre époux* (1898). The Celtic origin of the community has been advocated by Pardessus, *Ac. Inscr.* 10, 752, and others: see Brissaud (Howell), *Hist. of French private law*, p. 818, note 1.

the community a Germanic origin,[217] and holds that its formation is due to economic causes of the later Middle Ages.[218]

(4) Second Marriages

Pagan Roman law favored second marriages; Christian Roman law did not. That the pagan Roman law favored second marriages is seen from the famous statute of Augustus, the *lex Julia et Papia Poppaea*,[219] which was designed to increase the birthrate. This statute forced widowers and widows, as well as divorced persons, to remarry[220] under pain of being visited with the penalties inflicted for celibacy.[221] These penalties, as well as those for childlessness,[222] endured for centuries in the Imperial Roman law until abolished gradually by Constantine and subsequent Christian Emperors — the last vestiges of Augustus' legislation disappearing during Justinian's reign.[223] § 482

Although the Christian Roman law did not favor second marriages, it did not prohibit them. The penalties for the second marriage were numerous[224]: one of these — forbidding the remarrying spouse having children of the first marriage

[217] Brissaud, *Id.*, pp. 816, 818 note 1.

[218] Brissaud, *Id.*, pp. 817, 818 note 1. And Brissaud strongly disputes the claim that the community is derivable from old Teutonic customs, although he admits that the community was already in existence in the Frankish or Carolingian barbarian period. The old Teutonic customs are claimed as a source in *Cole* v. *His Executors*, 7 Martin, *N. S.* (La.) p. 41, 18 Am. Dec. p. 241; Loewy, *Spanish community*, etc. 1 Cal. Law Rev. p. 32. But there is much documentary evidence available to support Brissaud's contention. The community is rarely mentioned in the 12th century; and, although Beaumanoir in the following century explicitly affirms it to be an immemorial custom, the community is not regulated in detail until the 15th century, — Brissaud, *Id.*, pp. 816–17.

[219] Enacted A.D. 9.

[220] Men immediately, women at the expiration of a certain period of time: see Ulpian, *Reg.* 14.

[221] See Gaius, 2, 144, 286; Ulpian, *Reg.* 17, 1.

[222] See Gaius, 2, 206.

[223] *Code*, 6, 51, 1.

[224] See supra § 479; *Code*, 5, 9, 3, 1; *Code*, 5, 9, 6; *Code*, 5, 10; *Nov.* 22, ch. 21–8; *Nov.* 98, ch. 2; *Nov.* 117, ch. 13; Mackeldey (Dropsie), *Roman law*[15], § 581.

to give to the second husband or wife a greater amount of property than the smallest amount which she leaves to any child of the first marriage — has descended into French law.[225] Moreover remarriage of a widow or a divorcee within a year after the dissolution of the marriage by death or divorce was forbidden under penalty of infamy and loss of property.[226] This prescribed year of mourning (annus luctus) is found also in modern law.[227] And Blackstone admits the Roman origin of the early Saxon rule forbidding a widow's remarriage within a year after her husband's death.[228] Moreover at one time in England a person marrying a second time, or wedding a widow, was deprived of benefit of clergy.[229]

Justinian made ineligible for the office of priest or deaconess any person entering into a second marriage.[230] And three centuries later the Emperor Leo VI made marriage for the third time a crime.[231]

(5) Concubinage (Concubinatus)

§ 483 **Concubinage an inferior sort of marriage.** During the Empire there existed a recognized quasi-matrimonial relation of the sexes, — namely concubinage.[232] It was monogamous: it was unlawful for a man to have a wife and a concubine, or more than one concubine, at the same time.[233]

[225] *Civil code*, art. 1098; Girard, *Manuel de droit romain*[5], p. 165, note 4.

[226] *Code*, 5, 9, 2 (A.D. 381); *Nov.* 22, ch. 44, ch. 2 and ch. 16; *Code*, 5, 17, const. 8, §§ 4a–4b, const. 9; *Dig.* 3, 2, fragm. 1 and 11, §1; supra § 453 (on infamy); Mackeldey, *Id.* § 582. The older pagan Roman rule was that the wife must wait 6 months after a divorce and 12 months after husband's death: Ulpian, *Reg.* 14; *Code*, 5, 9, 2 (10 months).

[227] *Civil code* of France, 228; Louisiana, 137.

[228] *Commentaries*, vol. i, p. 457. "Sit omnis vidua sine marito duodecim menses," is a provision of both the laws of Ethelred and of Canute.

[229] Williams, *Inst. of Justinian*[2], p. 24.

[230] *Nov.* 123, 13.

[231] *Leonine constitutions*, 90. See as to these statutes, vol. i, § 176, fifth note from the end of the section.

[232] *Dig.* 25, 3, 1; *Dig.* 25, 7, 3, 1. Concubinage was legalized by legislation of the Early Empire, originally by legislation of Augustus.

[233] Paulus, *Sent.* 2, 20, 1; *Dig.* 50, 16, 144; *Code*, 5, 26, 1.

Concubinage was a union lower than marriage, — especially for the woman.[234] She was not elevated to the rank or position of the man.[235] She did not bear the title of wife (*uxor*), but was called *amica* or *concubina*.[236] Concubinage, like marriage, could be dissolved at any time by either party.[237] The chief difference between marriage and concubinage was this: children born of concubinage (*liberi naturales*), unlike children born of lawful wedlock, were never subject to the paternal power of their father.[238] (§ 483)

Although the Christian Emperors did not favor concubinage, it formed a part of the law of Justinian, and endured as an institution of Roman law for 200 years after Justinian until its abolition in the middle of the 8th century by Leo the Isaurian (the Emperor Leo III [239]). Over a century later Leo the Philosopher (Leo VI) confirmed the abrogation of concubinage as being contrary to the tenets of religion and decency, saying, "Why should you prefer a muddy pool, when you can drink at a purer fountain?" [240] But in Western Europe concubinage as an inferior sort of marriage survived the Roman Empire, being practised by the conquering Teutonic peoples. It was recognized during the Middle Ages,[241]

[234] See *Dig.* 32, 49, 4; Paulus, *Sent.* 2, 20, 1.

[235] Concubinage between persons of unequal rank was frequent. It was regarded as more seemly for a freedwoman to become the concubine rather than the wife of her former master (*Dig.* 25, 7, 1, pr.; *Dig.* 23, 2, 41, 1; *Dig.* 48, 5, 14, pr.). A governor of a province could take one of his female subjects as a concubine (*Dig.* 25, 7, 5), but not as wife (supra § 462). Several good Emperors — Vespasian, Antoninus Pius, Marcus Aurelius — had a concubine.

[236] *Dig.* 50, 16, 144.

[237] See infra §§ 484 et seq.

[238] *Inst.* 1, 10, 12; Gaius, 1, 64. But the offspring of concubinage, if legitimatized, were thereby made subject to the *patria potestas:* see infra "legitimation," §§ 492 et seq.

[239] Supra vol. i, § 174.

[240] *Leonine const.* 91 (translation by Mackenzie, *Roman law* [7], p. 100).

[241] For instance, it was recognized in the first Spanish Council of Toledo (A. D. 398), in the Roman synod of Pope Eugenius II (826), in the Roman Councils of 1052 and 1063, in the Scotch laws of William the Lion (c. 1214), in English law of the same century as given by Bracton in his famous treatise, and in the Danish Code of Valdemar II (in force 1280–1683). "Left-handed" or morganatic marriages were permitted by the Salic law

and has survived to the present time in the morganatic marriages of royalty.

2. DIVORCE

§ 484 **Dissolution of marriage by death.** Marriage was dissolved in any period of Roman law by the death of either party.[242] Moreover if either the husabnd or wife lost his or her civil rights, that is, suffered a total loss of status, the marriage was dissolved by *civil* death.[243]

§ 485 **Dissolution of marriage by divorce.** Marriage is dissolved also by divorce. Roman law held marriage to be a contract,[244] and was consistently logical in recognizing that marriage — like any other contract — might be broken or dissolved. Consequently Roman law permitted the dissolution of marriage at the will of one or both of the spouses.[245] Divorce by the will of either husband or wife was known as *repudium*[246]; originally in Roman law this right belonged to the husband only,[247] but later it was extended to the wife.[248] Divorce by mutual consent was called *divortium*.[249] Moreover Roman law held that a contract not to divorce was invalid, because it infringed on the right of the married pair to a divorce if ever desired.[250] Such a contract is unknown in the English

between noblemen and women of inferior station. The 16th century Council of Trent imposed heavy ecclesiastical penalties on concubinage. See 6 *Encycl. Britan.*[11], 840.

[242] *Dig.* 24, 2, 1.

[243] A *maxima capitis deminutio*, or the loss of freedom (supra §§ 432, 437,) was necessary, e.g., being made a prisoner of war (*Dig.* 24, 2, 1; *Dig.* 49, 15, 12, 1; *Nov.* 22, ch. 7–8. (Justinian required the wife to wait 5 years before remarrying). A *media capitis deminutio*, or the loss of citizenship, did not of itself dissolve the marriage (*Code*, 5, 17, 1). See also supra § 452.

[244] See supra §§ 469, 474, 475.

[245] A marriage could be dissolved because of the impotency or unfruitfulness of one of the married pair. See supra § 461; *Code*, 5, 17, 10; *Nov.* 22, 6; *Nov.* 117, 12. On the year of waiting required of a divorcee before she was permitted to remarry, see supra § 482.

[246] See infra § 487.

[247] Hunter, *Roman law*[4], p. 691. A wife *in manu* (supra § 470) could not divorce her husband.

[248] *Id.* A wife *not* in manu (supra § 474) could divorce her husband.

[249] See infra § 488.

[250] *Code*, 8, 38, 2.

Common Law; and it is not known how far the courts would recognize it.

Irrespective of its form, divorce in Roman law was a private act requiring the sanction of no court of justice. But in every system of modern law, including the Anglo-American, intervention of a court is necessary.[251] The Roman divorce was always *a vinculo* or absolute in its effects; it permitted the parties to remarry. The English modified divorce or judicial separation *a mensa et thoro* was unknown to Roman law; this is of Canon Law origin.[252] By a judicial separation the parties still remain husband and wife, and cannot remarry. By the Canon Law a decree of nullity, making the marriage void *ab initio* on account of some canonical impediment existing before the marriage, partly took the place of an absolute divorce; gross misconduct after marriage was, at the most, ground only for a judicial separation *a mensa et thoro*.

Divorce in Ancient Roman law. The XII Tables recog- § 486
nized freedom of divorce; but it is said that no Roman husband "took advantage of the liberty for 500 years, until Spurius Carvilius put away his wife for barrenness, by order of the Censor." [253] The censors, during the Republic, undoubtedly exercised their authority to check divorce by the husband, as they did in the case of Lucius Antonius who was expelled from the Senate because he repudiated a girl he had married.[254] Under the ancient Roman marriage with marital power a wife in manu, who had no independent status, could not divorce her husband [255]; but if he divorced her, she could compel him to release her from the marital power (manus).[256] A marriage with marital power formed by the old ceremony of *confarreatio* was dissolved by a proceeding called *diffareatio*, and a marriage by *co-emptio* or *usus* was dissolved by a sort of release called *remancipatio*.[257]

[251] But see infra § 488 as to Japan.

[252] *Corpus juris canon., Decretal. of Gregory IX*, 4, 19; *Id.* 2, 23, ch. 12; *Id.* 5, 16, ch. 6; *Id.* 2, 13, ch. 8 and 13. See also Mackeldey (Dropsie), *Roman law* [14], § 583.

[253] Hunter, *Roman law* [4], p. 691.

[254] Hunter, *Roman law* [4], p. 691.

[255] See supra § 470.

[256] Gaius, 1, 136a; Hunter, *Id.*

[257] Hunter, *Id.* p. 227; Sohm (Ledlie [3]), *Roman law*, p. 474. See also supra §§ 471–3.

§ 487 **Divorce in Later Republican and in Imperial Roman law: (1) divorce at the will of either spouse (repudium).** This is forced dissolution of marriage by the husband alone, or by the wife alone.[258] It is this form of divorce in the Roman world which has awakened the thunders of moralists throughout the ages ever since Rome fell, because of the recklessness with which the Romans often exercised it during the Later Republic and the Empire.

Prior to Augustus' celebrated divorce statute — the *lex Julia de adulteriis* [259] — all either party needed to do, in order to effect a divorce, was to tell the other party that the marriage was at an end.[260] It was enough to say "manage your own affairs," "mind your own business," or "keep your own things to yourself." [261] Generally the husband put the wife out of the house, after taking away the keys from her and giving her back her dowry.[262] A man might divorce his wife in her absence: Cicero terminated by letter his marriage with Terentia.[263] But by the divorce act of Augustus restrictions were placed on this form of divorce. It must take place before seven witnesses by a written bill of divorcement (*libellus repudii* [264]) which ought to be delivered to the other party,[265] — although the marriage was dissolved without the delivery of the bill.[266]

By repudium a lunatic spouse could be divorced by the other party to the marriage.[267] Moreover it should be borne in mind that originally the head of the family (paterfamilias) of either spouse could dissolve the marriage without his child's consent [268] — a source of great trouble and abuse, especially

[258] *Repudium* has been called, rather loosely, *divortium mala gratia*.

[259] Enacted A.D. 18.

[260] *Dig.* 38, 11, 1.

[261] "Tuas res tibi agito," "tuas res tibi habeto," (*Dig.* 24, 2, 2, 1); Roby, *Roman private law*, vol. i, p. 134.

[262] Hunter, *Roman law*[4], p. 690.

[263] *Id.*

[264] *Dig.* 24, 2, 9; *Dig.* 24, 2, 3. The witnesses must be citizens.

[265] *Dig.* 24, 2, 2, 3.

[266] *Code*, 5, 17, 6.

[267] *Dig.* 24, 2, 4.

[268] Hence a lunatic wife could thus be divorced from her husband, — *Dig.* 24, 3, 22, 9.

for a married daughter under the later Roman régime of marriages involving no marital power and no change of status.[269] But finally the Emperor Marcus Aurelius abolished the paternal privilege of divorcing a daughter without her consent.[270] Yet in the law of Justinian there still remained one case where no divorce was possible without the paternal or parental consent — namely when the dowry [271] had been provided by the father or mother, who would be injured by its forfeiture.[272]

Repudium persisted in the Christian Roman law, which never contested the principle of repudiation although it punished unjustifiable repudiation. But the Christian clergy obtained from the Emperors succeeding Constantine legislation confining the right of repudiation to cases where *one* of the spouses had been guilty of gross misconduct.[273]

§ 488 (2) **Divorce by mutual consent** (**divortium**). This is voluntary dissolution of marriage.[274] This form of divorce was never employed with the frequency of repudiation (*repudium*).[275] Divorce by mutual consent was not possible under the ancient Roman régime of marriages with marital power involving a change of status by the wife.[276] Under the later Roman conception of marriage as a legal equality and a partnership between man and wife,[277] divorce by mutual consent became possible. In other words, divorce by mutual consent was but the antithesis of marriage by mutual consent: mutual consent is necessary to establish marriage; why should not another act of mutual consent be equally effective to terminate marriage? Freedom of contract is thus preserved.

Divorce by mutual consent, being in Roman law a private act requiring the intervention of no court, had all the palpable

[269] See supra § 474.

[270] Paulus, *Sent.* 5, 6, 15; *Code*, 5, 17, 5.

[271] See supra § 478.

[272] *Nov.* 22, 19. Justinian affirmed Marcus Aurelius and Diocletian.

[273] See *Code Theod.* 3, 16, 1 (Constantine); *Code Theod.* 3, 16, 2 (Honorius and Theodosius); *Code*, 5, 17, 8, 2 (Theodosius and Valentinian); *Nov.* 117, 8 and 9 (Justinian); Hunter, *Roman law*[4], pp. 691–3.

[274] Divortium has been called *divortium bona gratia* or *communi consensu.*

[275] See supra § 487.

[276] See supra § 470.

[277] See supra § 474.

(§ 488) defects accruing from such secrecy; and yet it was useful, necessary, and even moral — it furnished no intimate details of misunderstanding, incompatibility of temperament, excesses, ill-treatment, or insults for the curiosity of the public or the delectation of lawyers to feed upon.

From the beginning of divorce by mutual consent down across the centuries to Justinian the Roman State never interfered with this form of divorce. Following the conversion of Constantine to Christianity, the Christian clergy tried to uproot the ancient maxim of Roman law that marriage should be a free union, dissolvable at will. But they did not succeed in encroaching upon the principle of divorce by mutual consent.[278] The doctrine of the indissolubility of marriage, except by death, is not a doctrine of Roman law.[279] And although in the time of Justinian the Christian clergy had become so powerful as to finally persuade him to prohibit divorce by mutual consent except in a very few cases,[280] yet Justinian's successor in the first year of his reign repealed all his uncle's prohibitions and restored divorce by mutual consent to its original freedom.[281]

Divorce by mutual consent was originally provided for in the French Code Napoleon.[282] The divorce of Napoleon and Josephine was by virtue of this French law, the source of which was Roman jurisprudence. When the Bourbon monarchy was restored in 1816, divorce was abolished. And the law of 1884, re-establishing divorce in France, did not revive divorce by mutual consent. The Japanese Civil Code [283] provides that "the husband and wife may effect a divorce by mutual consent," — thus repeating the Roman law rule and the original rule of the Code Napoleon.

[278] Hunter, *Introd.*[6], p. 34.

[279] It is a Canon Law doctrine: see supra § 475.

[280] Divorce was allowed in three cases only: impotency of the husband; when either spouse wished to enter a monastery or convent; when either spouse was a prisoner of war for a certain period of time. *Nov.* 117, 10–12; *Nov.* 134, 11.

[281] *Nov.* 140, 1 (Justin II, A.D. 566).

[282] Art. 276 et seq.

[283] Art. 808 (Lönholm).

Descent of divorce into modern law. Dissolution of marriage by divorce is now permitted by almost every modern system of law. But a few countries like Austria and Italy allow only a judicial separation or limited divorce,[284] and thus indicate the survival of the Canon Law prohibition of absolute divorce. § 489

In England, notwithstanding the Protestant Reformation, the ecclesiastical courts clung to the Canon Law doctrine for several centuries later: prior to the year 1858 — not so very long ago — no absolute divorce was allowed.[285] And to-day English law still permits of limited divorce or judicial separation as well as of absolute divorce.[286] In Scotland there is a different story. Divorce has been allowed by Scotch law ever since 1573,[287] or for over 300 years. Scotch law has always reflected, more strongly than the English, the pervading influence of Roman law.[288] In most of the United States limited divorces are not granted.[289]

Custody of the children after a divorce. In Roman law the custody of the children was usually provided for in the divorce itself; if one party was at fault, the children went to the innocent party, and if the guilty party was the father, he had to support them; if neither party was at fault, the father generally took the boys, and the mother the girls.[290] These rules have their counterpart in modern American law. § 490

Alimony. Alimony — an allowance for support paid by order of court to the wife by the husband, either pending a suit for divorce or after a divorce has been decreed — was unknown in this special sense to Roman law. But the notion of alimony as a claim for support is of Roman law origin: a ward could bring a proceeding against his unfaithful guardian whereby the praetor would fix (*decernere*) the amount necessary for his support (*alimenta*).[291] Now the English § 491

[284] *Civil Code* of Italy, 148; Austria, 103, 111; see also supra § 485.

[285] Divorce was made possible by the Act 20 and 21 Victoria, ch. 85.

[286] *Id.*

[287] Mackenzie; *Roman law*[7], p. 124.

[288] See supra vol. i, § 359.

[289] Terry, *Common Law*, § 972.

[290] See *Code*, 5, 24, 1; *Nov.* 117, 7.

[291] Cumin, *Manual of Civil Law*[2], p. 79; *Code*, 5, 50.

ecclesiastical courts which had jurisdiction of matrimonial causes were regulated by the Canon Law, which had adapted the matrimonial alimony from the Roman alimony of the ward; and this explains how the doctrine of alimony came into Anglo-American law.[292]

3. LEGITIMATION

§ 492 **Legitimation defined. A product of Christian Roman law.** The sources of the paternal power other than marriage are legitimation and adoption. We shall consider these subjects in the order stated, which is also the order of treatment of the French, Spanish, German, Swiss, Louisiana, and other modern civil codes.

Legitimation is an artificial proceeding put at the disposal of natural fathers, to acquire the paternal power over children whom they have had outside of lawful wedlock. By adoption [293] the father could acquire paternal power either over children born of concubinage (*liberi naturales*) or of accidental relations (*vulgo concepti* or *spurii*). Legitimation, however, was applicable only to natural children born of concubinage,[294] and not to promiscuous children.

Legitimation is a doctrinal invention of the Christian Roman law; the pagan law recognized simply the relationship of the natural child to its mother. And it seems that the only exception to the rule of the pagan law was the privilege which the Emperor Hadrian bestowed on soldiers of having as cognate heirs ab intestato such natural children as were born to them during their service.[295] To obviate the shame of unions other than marriage, and to remove the stain of birth from natural children, legitimation was introduced by legislation of Christian Emperors. There were in Roman law three modes of legitimation: by subsequent marriage, by Imperial rescript, by presentation to the curia.

[292] *Catholic encyclopedia*, vol. i, p. 313; Terry, *Common Law*, § 973.

[293] See infra "adoption," §§ 496 et seq.

[294] See supra § 483.

[295] See Girard, *Textes de droit romain*[3], p. 176; supra § 463.

1. Legitimation by subsequent marriage of the parents. §493 This provision was first introduced into Roman law by Constantine the Great in A.D. 335. About a century and a half later the Emperor Zeno abrogated this act of Constantine.[296] And legitimation remained abolished until its restoration by Justinian,[297] who amplified considerably the legislation of Constantine. There must be a regular marriage evidenced by a written contract with a settlement of dowry.[298] It made no difference whether or not the father had legitimate children born prior to the concubinage.[299]

The Roman rule of legitimation by subsequent marriage is reiterated in all its fullness by the principal systems of modern law, such as the French, German, Italian, Spanish, Japanese, Louisiana, and Scotch.[300] But the English and American Common Law rule is contrary to the Roman: a bastard cannot be legitimated by the subsequent marriage of the parents.[301] An act of parliament or of a state legislature is necessary to accomplish this.[302] And England still clings to this ancient barbarously harsh rule of the Common Law, which was settled as long ago as the 13th century, when at the famous Parliament of Merton the rude barons noisily decried and defeated the adoption of the Roman rule as to subsequent marriage on the ground of its being a "foreign" law.[303]

But is must not be overlooked that the Roman rule did actually break into — slightly to be sure — the "sacred" character of the indigenous (?) Common Law. Blackstone, after stating that as to legitimacy "with us in England the rule is narrowed," [304] then rather unconsciously proclaims the

[296] *Code*, 5, 27, 5 (A.D. 476); Hunter, *Roman law*[4], p. 201.

[297] *Code*, 5, 27, 10 (A.D. 529).

[298] *Id.;* supra §478. See also *Nov.* 89, 8; *Nov.* 78, 3.

[299] *Nov.* 89, 8; *Nov.* 12, 4.

[300] *Civil code* of France, 331; Germany, 1719–22; Italy, 194; Spain, 120; Japan, 836; Louisiana, 199; Mackenzie, *Roman law*[7], p. 130 (Scotland).

[301] Terry, *Common Law*, p. 123.

[302] Williams, *Inst. of Justinian*[2], p. 26; 5 *Cyc.*, p. 632.

[303] 20 Hen. III, ch. 9; Bracton, 416 b.

[304] *Commentaries*, vol. i, p. 446; see also pp. 447, 451, 454–5.

intrinsic justice of the Roman doctrine of legitimation by subsequent marriage, when he proceeds to mention one case in the English Common Law where the Civil Law rule has been recognized: namely where a bastard, whose parents subsequently married, died seised of his parents' land and the inheritance descends to the bastard's issue, any legitimate children of the bastard's parents are barred in favor of the bastard's issue[305]; "and that this is due to the Civil Law is shown by the fact that if the bastard's parents have never married, the bastard's issue will have no such rights."[306]

In the United States, nearly one quarter of the states have abrogated the Common Law rule and returned by statute to the just and merciful rule of the Roman law — thus recognizing, at last, legitimation by subsequent marriage. Among these states are Alabama, Indiana, Kentucky, Massachusetts, New York, Ohio, Pennsylvania, Texas, Vermont, Virginia.[307]

§494 2. **Legitimation by Imperial rescript.** Legitimation by Imperial rescript was analogous to the grant of free-born citizenship by the Emperor to freedmen (*restitutio natalium*), thus wiping out the stain of slavery.[308] Legitimation by rescript of the Emperor was an act of Imperial omnipotence introduced by Justinian.[309] It was obtainable on petition to the Emperor, when the father had no legitimate children. It might be applied for and obtained also after the death of the father, who, although not having petitioned during his life for the rescript, had declared in his will that his children should be legitimatized.[310] The law of Italy and Spain provides for legitimation by *royal* rescript,[311] while in the Anglo-American Common Law legitimation is possible by act of parliament or of a state legislature.[312]

[305] Blackstone, *Com.*, vol. ii, p. 248; Scrutton, *Roman law in England*, p. 144, (*bastard eigné* and *mulier puisné*).

[306] Scrutton, *Id.*

[307] See 5 *Cyc.* 632. As to the effect of legitimation by subsequent marriage on the father's right to curtesy, see 24 Harvard Law Review, p. 146 (notes).

[308] *Dig.* 40, 11, 5, 1. See also *Dig.* 40, 11, 2; *Dig.* 40, 11, 4 and 5; supra § 434.

[309] *Nov.* 89, 9.

[310] *Nov.* 89, 10.

[311] *Civil code* of Italy, 194; Spain, 120.

[312] 5 *Cyc.* p. 632.

3. Legitimation by presentation to the curia (per oblationem curiae). This mode of legitimation was also introduced by Justinian.[313] It was accomplished by making a son a member (*decurio*) of the city council (*curia*) of a municipality.[314] Presentation to the curia was not limited to the lifetime of the father: he could by will make his natural son a decurio, and consequently legitimate. A daughter could be legitimated by marrying her to a member of the curia.[315] The curial dignity was hereditary.[316] During the Later Empire its burdens, especially the responsibility for the collection of the Imperial taxes, greatly exceeded its privileges.[317] Hence legitimation by oblatio to the curia was really a bribe to increase the membership of this municipal body. But this kind of legitimation, unlike the other forms of legitimation,[318] was restricted in its effect to the father only; it gave the child no claim on any of his relatives.[319] § 495

4. ADOPTION

Nature and scope of adoption. In Roman law, adoption was a source of the paternal power.[320] The purpose of adoption was "to create artificially the paternal power for the benefit of a head of a family over a person who is not subject thereto by birth." [321] The person adopted might be absolutely unrelated to the adopter — the usual case; or might be his natural child; or might be a cognate but not an agnate,[322] § 496

[313] Nov. 89, 2, 1. As to the preliminary measures of earlier Emperors, see *Code*, 5, 27, 3; Hunter, *Roman law*[4], p. 202.

[314] The curia was developed somewhat after the analogy of the Senate at Rome, — *Code*, 10, 32 (31), 36.

[315] Moyle, *Inst. of Justinian*, vol. i, 5th ed., p. 136.

[316] *Code*, 10, 32 (31), 44.

[317] See *Code Theod.* 12, 1, 66; *Code*, 1, 3, 12; *Code*, 10, 32 (31), 38; *Dig.* 50, 2, 1; Smith, *Dict. of Antiq.*[3], "decurio"; infra "municipal corporations," § 910.

[318] Supra §§ 493–4.

[319] *Nov.* 89, 4.

[320] As to the *patria potestas*, see infra § 506.

[321] Bernard (Sherman), *First year of Roman law*, § 292. Adoption originated in the *jus civile*.

[322] See supra § 463. Promiscuous children (*vulgo concepti* or *spurii*) might be adopted, — supra § 492.

as for instance when a child was adopted by his or her maternal grandfather.

Adoption is probably of earlier invention in Roman law than wills; both have the same object in view — to avoid the extinction of a family by death of its head without heirs. Hence the endeavor of the law to provide fictitious heirs by an artificial relationship. And the pagan Roman law attached great importance to adoption, which was a means to prevent the family religious worship (*sacra privata*) from being extinguished for want of descendants to perpetuate these rites. Sometimes adoption was intended to satisfy some political interest: Cicero relates how the patrician Clodius had himself adopted by the plebeian Fonteius in order to secure his election to the tribuneship, a plebeian office.[323]

§ 497 **Essential conditions of adoption: (1) the requisite age.** The essential conditions of adoption are three in number: the parties must be of the requisite age, the adoption must imitate nature, and — until Later Imperial Roman law — only persons of the male sex could adopt.

The Roman jurist Gaius in the middle of the 2d century A.D. says: "Whether a younger person can adopt an older is a disputed point in both forms of adoption."[324] Four hundred years later Justinian declares[325]: "It is settled that a man cannot adopt another person older than himself, for adoption imitates nature, and it would be unnatural for a son to be older than his father. Consequently a man who desires either to adopt or to adrogate a son ought to be older than the latter by the full term of puberty, or 18 years."

This principle has survived in modern law. The German Civil Code reads: "The adopter . . . must be at least 18 years older than the adopted child."[326] The French Civil Code reads: "Persons of either sex may adopt . . . Such persons must . . . be at least 15 years older than the person to be adopted."[327] The Spanish Civil Code has the same age requirement as the French.[328] The Japanese

[323] *Pro domo*, 13.
[324] Gaius, 1, § 106 (Poste, translator).
[325] *Inst.* 1, 11, 4. (Moyle).
[326] Art. 1744 (Wang).
[327] Art. 343 (Wright).
[328] Art. 173.

Civil Code reads: "A relative in the ascending line or a person older than the adopter cannot be adopted."[329]

(2) **The adoption must imitate nature.** Therefore a eunuch could not adopt, because he could never have a child; but an impotent person might adopt, because it is barely possible nature may some time cure his impotency.[330] In Cicero's time an unmarried man could not adopt, nor even a married man unless he was without hope of offspring.[331] § 498

(3) **Until Later Imperial Roman law, only persons of the male sex could adopt.** Modern law permits persons of either sex to adopt.[332] But Roman law confined the right to adopt to the male sex only, until A.D. 291, when the Emperors Diocletian and Maximian granted this privilege to women,[333] to which Justinian thus refers in his Institutes: "Women cannot adopt, for not even their natural children are subject to their power; but by Imperial clemency they are enabled to adopt, to comfort them for the loss of children taken from them."[334] This refers to adoption restricted to these consequences alone possible to women: for in Roman law they could not exercise the paternal power.[335] § 499

Survival of adoption in modern law. Adoption is found in most of the modern legal systems, such as the Austrian, French, German, Italian, Spanish, Swiss, and Japanese.[336] But in the English Common Law and in Scotch law the Roman adoption is unknown, even to the present time.[337] Any so-called adoption to-day in England makes no difference in legal consequences. But the courts of England have given recognition to adoption in a country where it has legal consequences, as § 500

[329] Art. 838 (Lönholm).

[330] Gaius, 1, 103; *Inst.* 1, 11, 9. The distinction is between the castrated (castrati) and the impotent (spadones).

[331] *Pro domo*, 13, 15.

[332] See for example the *Civil code* of France, 343.

[333] *Code*, 8, 47, 5. See also Ulpian, *Reg.* 8, 5; *Dig.* 1, 7, 21.

[334] *Inst.* 1, 11, 10 (Moyle).

[335] As to this subject, see infra § 506.

[336] *Civil code* of Austria, 179–86; France, 343–63; Germany, 1741–72; Italy, 202–19; Spain, 173–9; Switzerland, 264–9; Japan, 837–76.

[337] Williams, *Inst. of Justinian*[2], p. 28; Mackenzie, *Roman law*[7], p. 136.

in India.[338] Bills introduced into Parliament to make adoption the basis of legal rights and relationship have hitherto failed. Not yet is Great Britain in line with France and Germany, which, following the Roman law, have long since recognized that adoption should involve all the rights and duties of natural parentage.

In the United States a return by statute to adoption has been made in many of the Common Law states. Massachusetts was perhaps the very first state to reform the Anglo-American Common Law and introduce adoption. The statutes of the various states contemplate that the adopter shall be of suitable age to enter into parental relations. As to the age of the person adopted, some statutes use the word "minor," others "child"; and it is held by the court of last resort in Massachusetts, Indiana, and Missouri that under these statutes adults may be adopted.[339] In Louisiana, California, and Texas adoption always existed, being introduced via the French and the Spanish law.[340]

§501 **Forms of Roman adoption: (1) adrogation.** In Roman law there were two kinds of adoption: adrogation[341] (adrogatio) and adoption properly so-called (adoptio). Adrogation meant the adopting of a person who is sui juris and

[338] Williams, *Inst.* of *Justinian*[2], p. 28.

[339] 1 *Cyc.* p. 919; Stimson, *Am. statute law*, §§6640–51; in *Collamore* v. *Learned*, 171 Mass. 99, 50 N. E. R. 518, an uncle adopted two nieces and a nephew, aged 43, 39, and 25.

[340] See supra vol. i, §§263, 309.

[341] There is a current well-established English and German usage of "arrogation," "arrogate," "arrogans," "arrogatus," etc.: see the Roman law works of Hunter, Amos, Sohm, Abdy and Walker, Monro, Baron, Mackeldey, and also *Harper's Latin dictionary*, Smith's *Dict. of Gr. and Rom. antiquities*. But in the sources of Roman law (Gaius, *Institutes of Justinian*, *Digest*, *etc.*) the Latin words used are "adrogatio," "adrogare," etc., and hence the English and French usage of words repeating the "adr" is more in harmony with the Roman law itself: see Roman law works of Poste, Muirhead, Roby, Moyle, Girard, Petit, Cuq, Bernard, and also Dirksen's *Manuale* (Rom. law dictionary), Brissonius' *De verb. signif.* (Rom. law dict.). Finally, because the words "arrogate," etc., connote the meaning of *haughtiness*, it is confusing to use them to refer to a form of *adoption*.

independent.[342] In Ancient Roman law this kind of adoption was accomplished by a *lex curiata* or special act passed by the patrician assembly known as the Comitia Curiata[343]: hence no woman, or no Roman subject not a citizen,[344] could in this early time adopt[345] — for such persons did not have access to this assembly.

Adrogation might also be accomplished by will. Augustus Caesar was thus adopted by his uncle Julius Caesar.[346] Probably this mode of adrogation had to be confirmed by a special act of the Comitia Curiata.[347]

In the time of Diocletian the Imperial rescript superseded the Republican mode of adrogation,[348] and in the Justinian Roman law the rescript of the Emperor was the sole mode of adrogation. Justinian's Digest describes this method as follows: "By the authority of the Emperor a man adopts such as are sui juris; which kind of adoption is called adrogation, because the person adopted is asked, that is inter*rogated*, whether he desires the person whom he is intending to adopt should become his lawful son, and the person who is being adopted is asked whether he is willing that this should take place." [349]

Effects of adrogation. The person adrogated — generally an adult — lost his own independence, and became subject to the paternal power of the adrogans or adopting father. His children, if he had any, became the grandchildren of the adopting paterfamilias. A celebrated instance in Roman § 502

[342] "Sui juris" (*Gaius*, 1, 99 and *Inst.* 1, 10, 1); the person adopted is "paterfamilias" (*Gaius*, 3, 83 and *Inst.* 3, 10, 1). See also *Dig.* 1, 7, 12. In modern Greek adrogation is called εἰσποίησις.

[343] Cicero, *Pro domo*, 29; Aulus Gellius, *Noct. Atticae*, 5, 19 (translated by Hunter, *Roman law*[4], p. 205). See also supra vol. i, §§ 31, 49.

[344] *Peregrinus*, see supra § 442.

[345] Gaius, 1, 101. See also Gaius, 1, 104. But during the Empire after Diocletian women were enabled to adopt (supra § 499).

[346] Suetonius, *Div. Julius*, 83.

[347] See Girard, *Manuel de droit romain*[5], pp. 174–5.

[348] *Code*, 8, 47 (48), 2 and 6. The old Republican mode of adrogation had become a farce, for the people no longer met in the Comitia, — an assembly of 30 lictors having taken their place, Girard: *Id.* p. 173.

[349] *Dig.* 1, 7, 2, 1 (Monro).

history is the adoption (adrogation) of Tiberius by Augustus. The purpose of Augustus was to obtain as his heir to the Imperial dignity the unblemished Germanicus, who had been previously adopted by Tiberius; but, although the adrogation of Tiberius gave Augustus a noble grandchild, the predecease of Germanicus resulted in Tiberius becoming Emperor.[350]

The property of the adrogatus, or person adopted in adrogation, passed from his control and became merged in that of the adrogating paterfamilias.[351] Such was the original Roman rule. But in the law of Justinian the new father acquired only a life-use of the property brought by the person adrogated.[352] Originally the debts as well as the assets of the adrogated person were wiped out: but this injustice was remedied by the praetors, and the adrogating father had to pay his new son's debts or the creditor could seize the assets of the son.[353] Such was the law also in Justinian's time.[354]

The jurist Modestinus relates that the Emperor Claudius required a person under 25 years of age, sui juris, to obtain the consent of his curator or guardian before becoming adrogated.[355] And the Emperor Antoninus Pius compelled an adrogating paterfamilias to restore to the person adrogated under the age of puberty [356] his property, if the new father emancipated his adopted son *before* puberty.[357]

§ 503 **Forms of Roman adoption: (2) adoption properly so-called.** *Adoptio* meant the adopting of a person who is alieni juris and not independent.[358] Here an individual, who was in the power of his natural head of the family, passed out from the power of such paterfamilias to fall under the paternal power of a new father or head of a family.

[350] Inst. 1, 11, § 11.

[351] Gaius, 3, 84.

[352] *Inst.* 3, 10 2 gave him a usufruct only, after the analogy of the natural father.

[353] Gaius, 3, 84.

[354] *Inst.* 3, 10, 3.

[355] *Dig.* 1, 7, 8. See supra § 447; infra § 529.

[356] See supra § 467.

[357] *Dig.* 38, 5, 13.

[358] "In potestate parentum" (Gaius, 1, 99 and *Inst.* 1, 11, 11).

To secure the adoptio of a person in power, two things must be done: first, the paternal power of the natural father had to be extinguished; second, the paternal power of the adoptive father had to be constituted. In the ante-Justinian Roman law, whether of the Empire or of the Republic, the mode of accomplishing adoptio was by the father fictitiously selling his son three times, and his daughter or grandchildren once.[359] This clumsy process was founded on the Law of the XII Tables.[360] But Justinian abolished this centuries-old method, and substituted a mere declaration before a magistrate.[361] "Our . . . constitution," says Justinian, "has abolished the old fictitious form, and enabled parents to go directly to a competent magistrate, and in his presence release their sons and daughters, grandsons or granddaughters, and so on, from their power."[362] Both the adopted and the adoptive parent must also be present before the magistrate.[363] Such was the simplicity of the Justinian mode of adoption.

Effects of adoption properly so-called. 1. *As to the paternal power.* In the ante-Justinian law the adopted passed under the paternal power of the new paterfamilias: but, as the Roman jurist Modestinus held, "the children of one who is (so) adopted remain under the potestas of their natural grandfather."[364] If the adopting paterfamilias should assign his adopted grandson to be the son of one of his natural sons particularly designated, "the son's own consent is required," say the Roman jurists Julian and Paulus[365]: otherwise the son would be forced to have him as heir against his will, which would be unlawful.[366] But Justinian changed the time-worn §504

[359] Gaius, 1, 134. The sale or conveyance was technically called "mancipatio." Its form is given by Gaius, 1, 119. *Adoptio* by will never existed: see Hunter, *Roman law*[4], p. 211; *Dig.* 37, 14, 12.

[360] Table 4, 2.

[361] *Code*, 8, 47 (48), 11; *Inst.* 1, 12, 6, and 8. This declaration had to be recorded in writing ("actis intervenientibus").

[362] *Inst.* 1, 12, 6 (Moyle).

[363] *Code*, 8, 47 (48), 11.

[364] *Dig.* 1, 7, 40 (Monro).

[365] *Dig.* 1, 7, 6.

[366] *Inst.* 11, 11, 7. See *Dig.* 1, 7, 11.

(§ 504) Roman rule as to the acquisition of paternal power by the adoptive father: Justinian enacted that adoption conferred ordinarily no paternal power at all.[367]

2. *As to name.* The adopted as well as the person adrogated[368] took the name of his new father, keeping his old *gens* name as a surname but transformed into an adjective: for instance, Caius Julius Caesar *Octavianus* was the adopted name of Octavian, later the first Roman Emperor, who was the nephew of Julius Caesar; the adopted name of Scipio Africanus was Publius Cornelius Scipio *Aemilianus*. In French law the adopted takes the family name of the adopter in addition to his own name.[369] And the German law is the same.[370] In the United States the act of adoption settles the question of the name; generally the name of the new family is taken.[371]

3. *As to rights of succession to the property of the adopted.* The adopted obtained the right of succession as son or grandson of the adopter, but — prior to Justinian — he lost all rights of succession in his natural family. Justinian abolished this system of succession. By his statute[372] the adopted, in addition to acquiring new rights of succession in his adopted family, *still retained* his rights of succession in his old, natural family — he is still under the natural father's power in Justinianean Roman law.

In French law there is a complete preservation of Justinian's legislation: the Civil Code reads that "the adopted shall continue in his natural family and shall retain all rights therein," and "shall have the same rights in the succession of

[367] *Code*, 8, 47 (48) 10, pr. and §§ 1–3; Sohm (Ledlie[3]), *Roman law*, p. 481; Mackeldey (Dropsie), *Roman law*[14], § 597. Such an adoption was known as "adoptio minus plena." But Justinian did allow the old-time full adoption productive of the paternal power, or "adoptio plena," in one case only: when the adoptive parent was the father or grandfather of the adopted (*Code*, 8, 47 (48), 10; *Inst.* 1, 12, 8). An illegitimate child could be adopted by his father, — see supra § 496 note, § 492.

[368] As to adrogation, see supra §§ 501–2.

[369] *Civil code*, 347.

[370] *Civil code*, 1758.

[371] Terry, *Common Law*, p. 686.

[372] *Code*, 8, 47 (48), 10, pr., and §§ 1–3.

the adopter as a child born in marriage would have.[373] The German and Japanese codes give to the adopted the status of a legitimate child of the adopter.[374] But in the Roman-Dutch law, which is the law of modern South Africa,[375] the adopted has no right of succession ab intestato to the adopter.[376] In the United States the act of adoption itself should settle the question whether or not the adopted obtains a right of succession in his new family or retains his successoral rights in his old family[377]: although there is a conflict of authority, the weightier opinion is that, in the absence of a statutory provision, the adopted can inherit from the adoptive parent as fully as a natural child would inherit.[378]

5. THE PATERNAL POWER (PATRIA POTESTAS)

§ 505 **Character of the Roman family.** The basis of the Roman family (familia) was the paternal power. A person's capacity was affected by his domestic position. The distinction between a person *sui juris* (independent or *paterfamilias*) and a person *alieni juris* (dependent or *filiusfamilias*)[379] arose out of the administration of the paternal power. "The Roman's house was, in the strictest sense, his castle. The officers of the State did not dare to cross his threshold, and assumed no power to interfere within his doors. The head of a family was its sole representative: he alone had a *locus standi* in the tribunals of the State."[380] He himself answered for all wrongs done

[373] Art. 348, 350.

[374] *Civil code* of Germany, 1757, 1764; Japan, 860.

[375] See supra vol. i, § 270.

[376] Nathan, *Common law of South Africa*, vol. i, p. 103.

[377] Terry, *Common Law*, p. 686.

[378] *Upson* v. *Noble*, 35 Ohio St. 655 (1880); *Humphrey* v. *Davis*, 100 Ind. 369 (1884); *Power* v. *Hafley*, 85 Ky., 671 (1887); *Rowan's Estate*, 132 Pa. 299 (1890); *Buckley* v. *Frasier*, 153 Mass. 525 (1891); *Hilpire* v. *Claude*, 109 Ia. 159 (1899); *Flannigan* v. *Howard*, 200 Ill. 366 (1902). CONTRA: *Hale* v. *Robbins*, 53 Wis. 514 (1881). See also *Swick* v. *Coleman*, 218 Ill. 33 (1905); 60 Univ. of Penn. Law Rev. pp. 658–9.

[379] If a woman, —*filiafamilias*.

[380] Hunter, *Introd. to Roman law*[6], p. 27.

by any member of the family, and he alone sued for compensation due to any of his family. But the evolution and progress of Roman law tended to remove, as will appear, all the legal incapacities of children not necessary for their protection.

Originally and for many centuries, especially during the Republic, all the dependent members of the Roman family were under the *absolute power* or authority of the head of the family (paterfamilias). This power had different names descriptive of the condition of the various dependent members of the family: (1) *dominium*, over slaves[381]; (2) *patria potestas*, over children and descendants; (3) *manus*, over the wife[382]; (4) *mancipium*, over freedmen.[383]

But in the last stage of Roman jurisprudence as manifested in the 6th century A.D. and the age of Justinian, the family is found in the same position as in Ancient Roman law, *only* as to the dependent condition of slaves and children. *Dominium* and *patria potestas* were indeed exercised by the head of the family — but always (contrary to Ancient Roman jurisprudence) subject to restrictions imposed by law itself, which very greatly curtailed, especially as to the paternal power, the old despotic sway of the paterfamilias. The old powers of the head of the family over his wife (*manus*) and over freedmen (*mancipium*) were either obsolete or abolished in the law of Justinian.

§ 506 **Nature and scope of the paternal power.** The right of the head of a Roman family, which was called patria potestas, was the power which he as paterfamilias had over his children and male children's children, natural and adopted.[384] These children might be legitimatized[385] as well as legitimate. It should always be borne in mind that the patria potestas was exercisable over *agnatic*[386] descendants only. No cognatic

[381] See supra § 434.
[382] See supra § 469, 470.
[383] See supra §§ 434, 439.
[384] *Dig.* 50, 16, 215. It included also great-grandchildren descended in the male line.
[385] See supra § 492.
[386] See supra § 463.

descendant was subject to the paternal power: hence the children of a daughter were not in the power of that daughter's father, but in the power of the father of the children.[387] But the children of a son were in the power of the son's father.[388]

It made no difference whether the descendant in power was an infant or a full-grown adult: the private rights of both were controlled by paternal authority so long as the head of the family lived. But if the son or grandson in power was a State official, his private condition of subordination was not extended to his political relationship; in other words the son or grandson was entitled to the respect and obedience of the head of his family as to all acts as a State official, even if he remained in the power of his paterfamilias as to private rights.[389]

No woman could exercise the paternal power, for the mother or grandmother could never be under any circumstances the legal head of a family.[390] The Institutes of Justinian[391] would have us believe that the paternal power was peculiar to the Romans.[392] But about four centuries earlier the Roman jurist Gaius expressly excepted the Galatian people.[393] And in modern times Sir Henry Maine has shown to be true that many other ancient peoples had a power similar to the Roman patria potestas.[394]

The paternal power as found in modern law. The Roman § 507
paternal power has, as to its duration, no counterpart in modern law; parental control in modern law is always terminated by the child becoming of full age or marrying.[395] Moreover, no system of modern law recognizes that paternal power is possible over grandchildren. But the Roman law of paternal power has survived in modern law to this extent:

[387] *Inst.* 1, 9, 3.

[388] *Id.*

[389] See *Dig.* 1, 6, 9; *Dig.* 36, 1, 13, 5; *Dig.* 36, 1, 14; *Dig.* 5, 1, 77–8; *Dig.* 1, 7, 3.

[390] See Gaius, 1, 104; *Inst.* 1, 11, 10.

[391] See supra vol. i, § 138.

[392] *Inst.* 1, 9, 2.

[393] Gaius, 1, 55. See also the *Bible, Galatians*, iv, 1.

[394] *Ancient law*, 3d Am. ed., p. 131.

[395] See supra §§ 447, 448.

in all systems of modern law the child remains under the parental authority until majority or emancipation.[396] This authority is generally exercised by the father, if alive.[397] By Louisiana law, the parental authority is conferred upon both parents, but, when they disagree, that of the father prevails.[398] Most modern legal systems extend the paternal authority and all its privileges to the mother, when the father is dead.[399]

§508 **Extent of the Roman paternal power in the law of the Republic: (1) over the person of descendants in power.** Originally the head of the family had the power of life and death over his descendants as he did over his slaves.[400] Children were on the same footing as slaves. The paterfamilias could sell his descendants in power, corporally chastise them, or kill them.[401] A tragic instance of the exercise of this power occurred during the conspiracy of Catiline in the consulship of Cicero, when Fulvius — the bosom friend of Catiline — was put to death by his own father.[402] By a law as late as 52 B.C.[403] — in the very lifetime of Julius Caesar — the paterfamilias was omitted from the list of persons who could be guilty of that form of murder known as parricide. Not until Constantine and the Later Empire was the killing of a child made parricide.[404]

At the close of the Republic and for awhile during the Early Empire the paternal power existed in all its ancient rigor, restrained, if at all, by public opinion alone. The child or grandchild in power had no redress against the cruelty of the paterfamilias, who could also dictate his marriage or divorce him without his consent.[405]

[396] *Id.*

[397] *Id.* See for instance *Civil code* of France, 373; Germany, 1684; Spain, 154; Terry, *Common Law*, § 987 (England and U. S.).

[398] *Civil code*, 216.

[399] See *second* note above this note.

[400] See supra § 434.

[401] *Law of XII Tables*, 4, 2. See also Gaius, 1, 40; Paul. *Sent.* 5, 1, 1; *Code*, 8, 46 (47), 10; *Dionysius, Antiq. Rom.* 2, 27–8; *Law of XII Tables* 4, 3.

[402] Sallust, *Catilina*, 49.

[403] The *lex Pompeia de parricidiis*, see *Dig.* 48, 9.

[404] *Code*, 9, 17. Hadrian had punished with deportation to an island a father murdering his child, — *Dig.* 48, 9, 5.

[405] See supra §§ 468, 487.

Extent of the Roman paternal power in the law of the Republic: (2) over the property of descendants in power. Such persons had no proprietary capacity. Whatever the child or grandchild in power acquired in any way, belonged to the head of the family. The descendant in power had no proprietary rights at all; he was as incapable of owning property as a slave.[406] To be sure a filiusfamilias might be granted the enjoyment of some of the paterfamilias' property on the same terms as a slave[407]: but this property (called by the slave-word *peculium*[408]) could be retaken by the head of the family at his pleasure. During the Republic a person subject to the paternal power could never truly own anything, no matter how small in value. § 509

Extent of the Roman paternal power in the law of Justinian: (1) over the person of descendants in power. During the Early Empire paternal authority was gradually curbed by the strong hand of the law, and in the reign of Constantine the power of life and death openly passed from the father and was exercisable only by the State — as in modern law. This humane progress of Roman law was largely due to the liberalizing spirit of Greek culture and philosophy, which during the Early Empire powerfully affected for good the development of Roman law — this humane amelioration of the rigor of the paternal power being finally completed by Christianity.[409] § 510

The Emperor Trajan compelled the immediate emancipation[410] of cruelly maltreated children.[411] The Emperor Hadrian treated almost as a murderer[412] — and the Emperor Constantine as a full murderer[413] — the paterfamilias who killed his child. The Emperor Severus forbade corporal chastisement other than moderate flogging, — to this very restricted limit was now reduced the paternal power of life and death.[414]

[406] Gaius, 2, 87; Gaius, 3, 163. See supra §§ 434 et seq.
[407] *Dig.* 15, 1, 1, 5; *Dig.* 15, 1, 39.
[408] It was also known as *peculium profecticium*, *bona profecticia*.
[409] See supra vol. i, §§ 62–7, 144–53.
[410] See supra § 446.
[411] *Dig.* 37, 12, 5 (reigned A.D. 98–117).
[412] *Dig.* 48, 9, 5 (reigned A.D. 117–38).
[413] *Code*, 9, 17 (A.D. 318–19).
[414] *Code*, 8, 46 (47), 3 (A.D. 227).

And finally Constantine deprived the father of the right to sell his child, excepting a child newly born to parents extremely poor.[415] The old powers of dictating marriage and divorcing a child without his consent were abolished as early as the reign of Marcus Aurelius.[416] All the father had left was a sort of conditional veto as to the marriage.[417] The patria potestas of the law of Justinian gave but a curtailed and shadowy authority over the person of descendants in power.

§ 511 **Extent of the paternal power in modern law over the person of descendants in power.** The power of the father in modern law is quite like what he had in the Justinian Roman law. For instance, in the English Common Law, in German law, and in Japanese law the father has the right of lawful correction or moderate chastisement of his infant child.[418] French, Louisiana, and Mexican law also have provisions reminiscent of the ancient Roman rigor: no child under age can ordinarily leave his father's house without his permission.[419] And the father in French and Japanese law may correct his child by having him imprisoned not exceeding six months.[420]

There is in Great Britain and the United States a relic of the paternal power over the person of the child which is still to be seen in the giving away of the bride in the marriage ceremony of the Church of England and of the Protestant Episcopal Church.[421] The Canon Law, which is also the law governing marriages in England and the United States in the absence of statutory changes, does not deem the father's consent absolutely necessary to a valid marriage.[422] Generally in the United States, as in England,[423] by force of statute the

[415] *Code*, 4, 43, 2 (A.D. 329).

[416] *Code*, 5, 17, 5; Paul. *Sent.* 5, 16, 5; *Dig.* 43, 30, 1, 5 (reigned A.D. 161–80).

[417] See supra § 468.

[418] Williams, *Inst. of Justinian*[2], p. 21; Mackenzie, *Roman law*[7], p. 145; *Civil code* of Germany, 1631; Japan, 882.

[419] French *Civil code* of France, 374; Louisiana, 218; Mexico, 368.

[420] *Civil code* of France, 376 et seq.; Japan, 882.

[421] See Williams, *Inst. of Justinian*[2], p. 22.

[422] Williams, *Id.*

[423] Geo. IV, c. 76, §§ 16–18.

father may withhold his consent to a marriage by an infant, as has been previously noticed.[424]

§ 512 **Extent of the Roman paternal power in the law of Justinian: (2) over the property of descendants in power. Such persons had considerable proprietary capacity, namely peculium castrense, peculium quasi castrense, bona materna or adventicia.** In the Justinian law the descendant in power had a large measure of the modern law proprietary rights of children over majority, — such was the result of humane legal progress as seen in the last stage of the Roman patria potestas. This was the work of Emperors who made breaches in the ancient rule that the head of the family could take or own everything acquired by his descendants in power.[425]

During the Early Empire, through the efforts of Augustus or Titus, a person subject to the paternal power was authorized by law to hold as his own property his military pay — called *peculium castrense*.[426] This was followed during the Later Empire by still another privilege: Constantine the Great enacted legislation authorizing a person in power who was a State official to hold as his own property his salary received — called *peculium quasi castrense*.[427]

Certain other proprietary rights were given to persons in power by legislation of Constantine and Justinian. Although no Emperor ever interfered with the centuries-old right of the paterfamilias to retain full ownership over property which he had assigned for the use of the filiusfamilias,[428] yet Justinian (enlarging Constantine's enactment[429]) authorized a descendant in power to hold as his own property anything not coming from his father — that is, all property coming from his mother, maternal relatives, or strangers. But this property, called very suggestively *bona materna* or *bona adventicia*,[430] was,

[424] See supra § 468.

[425] Supra § 509.

[426] Paul. *Sent.* 3, 4a, 3; *Dig.* 49, 17, 1; Hunter, *Roman law*[4], p. 292.

[427] *Code*, 12, 30 (31), 1 (A.D. 320).

[428] The so-called *peculium profecticium* or *bona profecticia*, supra § 509.

[429] *Code*, 6, 60, 1 (A.D. 319).

[430] The expression *peculium adventicium*, although apt and frequently employed, is not Roman.

however, subject to a life-use by the paterfamilias [431] — a small remnant of the ancient proprietary comprehensiveness of the paternal power. If the descendant in power was subsequently emancipated [432] or set free from the patria potestas, the paterfamilias was entitled to only a life-use of one half of the property of the filiusfamilias in which he had no ownership.[433]

The introduction of curtesy into the English Common Law may be an application of the Roman rule as to the bona materna of Constantine, which comprised property coming to the son from his mother and of which the father was given a life-interest.[434] This would account for the indispensable requirement of the English law of curtesy that there must be issue born alive.

§ 513 **Extent of the paternal power in modern law over the property of descendants in power.** Parental rights over the property of minor [435] children resemble the rules of the Justinian Roman law. For instance the father has, ordinarily, the use or usufruct of the child's property until majority or emancipation in English, German, Spanish, and Louisiana law.[436] And the father has a right to the earnings of the child in the United States and in Spain [437]; but the law of England, France, Germany, and Mexico is otherwise.[438]

§ 514 **The Roman paternal power was dissolved by death, emancipation, elevation of the descendant in power to certain**

[431] *Code*, 6, 61, 6 (Justininian); *Inst.* 2, 9, 1. This life-use was known as usufruct (see infra "servitudes," § 586.)

[432] See supra § 446, infra § 514.

[433] *Inst.* 2, 9, 2.

[434] *Code*, 6, 60, 1; Scrutton, *Roman law in England*, p. 99; Wright, *Tenures*[2], p. 196. But see *Code*, 6, 60, 2, which gave the father a life-use of property coming from maternal relatives.

[435] That is, not of full age,— supra § 447.

[436] Williams, *Inst. of Justinian*[2], p. 21; *Civil code* of Germany, 1649; Spain, 160; Louisiana, 223. In French law such use terminates when child reaches the age of 18 (*Civil code*, 384). This right is somewhat like the Roman *bona adventicia* (supra § 512).

[437] Williams, *Id.*; Simpson, *Infants*, ch. 10, § 1; *Civil code* of Spain, 160.

[438] Williams, *Id.* *Civil code* of France, 387; Germany, 1651; Mexico, 378, 375. This favor to the child is very slightly reminiscent of the Roman *peculium castrense* (supra § 512).

dignities, and infliction of certain penal forfeitures on the head of the family. The patria potestas was dissolved in five ways. (1) By the natural or civil death of the paterfamilias.[439] But if the head of the family was a grandfather, then the grandchildren did not become sui juris or independent: they merely fell back into the power of their own father.[440] (2) By the natural or civil death of the person in power.[441] (§ 514)

(3) By emancipation. The modes of freeing a person from the paternal power differed with the period of Roman law considered. The usual mode of the ante-Justinian law was centuries-old, originating in the Ancient Roman law. It was known as the ceremony by the rod (*vindicta*), and formed the first part of the old mode of adoption properly so-called.[442] It consisted in a fictitious sale by the father before a magistrate, performed three times as to a son and but once as to a daughter or grandchild: whereupon the child or grandchild was set free from paternal authority.[443]

There was also another, but more recent, ante-Justinian mode of emancipation — the *Anastasian emancipation*. This had been introduced not long before Justinian's reign by the Emperor Anastasius,[444] and was emancipation by means of an Imperial rescript.

Justinian abolished the time-worn, cumbersome *vindicta* emancipation, substituting therefor his own mode which was exceedingly simple.[445] In the *Justinianean emancipation* a mere declaration made by the paterfamilias before a competent magistrate was sufficient to release the person in power and make him sui juris.[446] Justinian permitted also the optional use of the Anastasian emancipation, which had been an alternative mode prior to his reign.[447]

Modern "emancipation" is quite reminiscent of the Roman emancipatio, although in modern law a minor is ipso facto set

[439] Gaius, 3, 127–8; *Inst.* 1, 12, pr. and 1; supra § 452. The paternal power was exercisable by citizens only.

[440] Gaius, 3, 127; *Inst.* 1, 12, pr.; *Dig.* 1, 6, 5.

[441] Gaius, 3, 128; *Inst.* 1, 12, 1; supra § 452.

[442] Supra § 503.

[443] *XII Tables*, 4, 3; Gaius, 1, 132.

[444] *Code*, 8, 48 (49), 5 (A.D. 502).

[445] *Code*, 8, 48 (49), 6 (A.D. 531).

[446] *Id.*; *Inst.* 1, 12, 6.

[447] *Id.*

free from parental control by attaining full age or by marriage.[448] The usual mode of "emancipation" in modern law strongly resembles Justinianean emancipation (a declaration by the head of the family before a magistrate). For instance, in French law "emancipation" can be effected by a "simple declaration made by the father . . . before the *juge de paix*[449]"; in Spanish law "by appearance before the Municipal Judge[450]"; in German law "by an order of the Guardianship Court."[451]

(4) By elevation of the person in power to certain dignities. For instance, in pagan Roman law the paternal power was extinguished by a filiusfamilias becoming a priest of Jupiter or by a filiafamilias becoming a Vestal Virgin[452]; in Christian Roman law, by elevation of a person in power to the office of bishop of the Church, praetorian prefect, city prefect, consul, magister militum, or patricius.[453]

(5) By infliction of certain penal forfeitures on the paterfamilias. For instance, the paternal power was extinguished by a father attempting to expose his child to death, or by delivering a daughter to prostitution.[454] But the child, although freed from the patria potestas, retained all his or her family rights.

6. GUARDIANSHIP[455] (TUTELA AND CURATIO)

§515 **Nature and scope of guardianship.** Although a person may be a freeman, a citizen, and sui juris,[456] yet he may still lack full legal capacity, for instance if subject to the

[448] See supra § 446. Also (as to marriage), see for instance *Civil code* of France, 476.

[449] *Civil code*, 477.

[450] *Civil code*, 316.

[451] *Civil code*, 3.

[452] Gaius, 1, 130.

[453] *Inst.* 1, 12, 3; *Code*, 10, 32, 67 (66); *Nov.* 131, 3.

[454] See *Code*, 8, 51, 2; *Code*, 11, 41 (40), 6; *Nov.* 12, 2.

[455] A part of this was published by the author in 12 Michigan Law Review, p. 124, Dec., 1913, under the title of "The debt of the modern law of guardianship to Roman law," and is reprinted by permission.

[456] That is, freed from paternal power (supra §§ 505 et seq.)

control of a guardian because of extreme youth, sex, immaturity, incompetency, or lunacy. Therefore to complete the law of natural persons an account of the law of guardianship should be given. Guardianship occasioned by extreme youth or sex was known as the tutorship[457]; guardianship occasioned by immaturity, incompetency, or lunacy was known as curatorship.[458]

The Roman law of guardianship grew out of the family organization. It was also quite closely connected with the law of inheritance. The power of a guardian is that form of family power which ordinarily takes the place of paternal power when there is no one to exercise the latter. It was originally at Rome but an extension of the paternal power.[459] In this respect the conception of guardianship is different in English law — English guardianship rests on the principle of protecting the bodily and mental immaturity of youth.[460]

Qualifications for becoming a guardian. Only Roman citi- §516
zens of full age (25 years) were qualified to become guardians whether tutors or curators.[461] In Anglo-American law no person under majority can act as a guardian, — this rule is the same as the Roman.[462] In Roman law no woman could be a guardian,[463] except in one case: the mother or grandmother was qualified for the tutorship of her children or grandchildren.[464] The following persons were absolutely disqualified for the tutorship[465]: lunatics,[466] judicially declared spendthrifts,[467] the deaf and dumb,[468] minors[469] (under 25), bishops

[457] Infra § 522.
[458] Infra § 529.
[459] See Maine, *Ancient law*, ch. 5; Williams, *Inst. of Justinian*[2], p. 31.
[460] Maine, *Id.*
[461] *Inst.* 1, 13, 1 ("jure civili"); *Code*, 5, 34, 7; *Inst.* 1, 25, 13; supra §§ 441–3, 447. See also *Inst.* 1, 14, 1; *Inst.* 1, 22, 4.
[462] Williams, *Inst. of Justinian*[2], p. 42.
[463] *Code*, 5, 35, 1 and 2; *Dig.* 26, 1, frag. 16, pr., also frag. 18.
[464] *Nov.* 94; *Nov.* 118, 5.
[465] And probably for the curatorship.
[466] *Inst.* 1, 14, 2; *Dig.* 26, 1, 17.
[467] *Inst.* 1, 23, 3; *Dig.* 27, 10, 1, pr.
[468] *Dig.* 26, 1, 1, §§ 2–3.
[469] *Inst.* 1, 25, 13; *Code*, 5, 30, 5. See *Inst.* 1, 14, pr.

and monks,[470] soldiers in active service,[471] and any person trying to secure the office of guardian through bribery[472]; moreover a Jew could not be guardian of a Christian.[473]

§ 517 **Duties generally common to all guardians.** The principal duties common to guardians, whether tutors or curators,[474] were as follows: (1) Justinian required that a guardian must be sworn to faithfully perform his duties.[475] (2) Every guardian must give security for the faithful performance of his duties.[476] This is also the rule in Anglo-American law.[477] (3) In Roman law the guardian must take an inventory of the property of his ward.[478] In modern law the French, Japanese, and Anglo-American laws, for instance, are the same as the Roman.[479]

(4) The guardian (tutor[480]) was personally liable for fraud, neglect, or waste of the property of the ward or person under guardianship.[481] He could not alienate the ward's property.[482] And for malfeasance in the office of tutorship he was removable, — this was known as removal on the charge of suspicion (*crimen suspecti*[483]). If he wasted or alienated the ward's

[470] *Code*, 1, 3, 51 (52); *Nov.* 123, ch. 5, § 1.

[471] *Inst.* 1, 25, 14; *Code*, 5, 34, 4.

[472] *Dig.* 26, 5, 21, § 6.

[473] *Code*, 1, 9, 18 (19), — A.D. 439. But Jews seemed to have been allowed in earlier law, — *Dig.* 27, 1, 15, § 6 (Modestinus). For other disqualified persons, not important, see Mackeldey (*Dropsie*), *Roman law*[14], § 616.

[474] So far as was possible under the varied forms of curatorship (infra §§ 529–31), the duties of a curator were usually the same as those of a tutor: this is recognized also by Hunter, *Roman law*[4], p. 733. As to the special duties of tutors and curators, see infra §§ 527, 530.

[475] *Nov.* 72, 8; *Code*, 5, 70, 7, §§ 4–7; *Code*, 1, 4, 27.

[476] Gaius, 1, 199–200; *Inst.* 1, 24, pr.; *Code*, 5, 42, 1 and 5; Hunter, *Id.* pp. 715, 734. See also *Dig.* 46, 6; *Dig.* 26, 3, 5; *Dig.* 27, 8, 1, 15.

[477] Williams, *Inst. of Justinian*[2], pp. 37, 42.

[478] *Code*, 5, 51, 13; *Dig.* 26, 7, 7, pr.

[479] *Civil Code* of France, 470; Japan, 917.

[480] A similar prohibition seems to have been applicable to a general curator (infra § 530).

[481] *Dig.* 26, 10, frag. 4, § 4, frag. 3, §§ 12, 18, frag. 7, § 1.

[482] *Dig.* 26, 7, frag. 12, § 3, frag. 22; *Dig.* 27, 9, 1, pr.; *Code*, 5, 37, 22. But see infra § 519, permitting alienation by order of court.

[483] *Inst.* 1, 22, 6; *Inst.* 1, 26, 2; *Dig.* 26, 10, frag. 4, § 4, frag. 9, frag. 10, §§ 1 and 5. It dates from the XII Tables.

property in any way, not only could he be removed, but he (§ 517)
was also liable to a double value fine,[484] or to a restitution to the ward upon the ward reaching majority or upon his own removal.[485] Modern law is like the Roman. For instance, in German law it is provided that the guardian cannot dispose of or give away the property of the ward; almost all his acts of an obligatory nature must receive the sanction of the family council.[486] In French law the guardian cannot contract an obligation or sell property for the ward without consent of the family council.[487] In England and America, alienation of the ward's property cannot be had without sanction of the proper court.

(5) The guardian (tutor) had charge of the person as well as the property of the ward.[488] And this was true also of the guardian (curator) of an idiot or lunatic.[489] In modern law the guardian generally takes charge of the person as well as the property of the ward: for instance, such is the rule in French, German, and Anglo-American law.[490]

(6) The guardian (tutor) must hand in a final account of his administration to the ward or his heirs upon the termination of his guardianship.[491] Modern law repeats the Roman on this point: for instance, the Anglo-American, French, German, Spanish, and Japanese laws require a final account from the guardian to the ward.[492]

[484] *Actio de rationibus distrahendis: Dig.* 27, 3, 2, pr.; *Dig.* 27, 3, 1, 20 and 24. This action originated in the XII Tables, — Hunter, *Roman law*[4], p. 724, note. 1.

[485] *Actio tutelae directa: Dig.* 27, 3, 4, pr.; *Dig.* 27, 3, 1, 16; Hunter, *Id.*, p. 723. And the ward might bring also the ordinary actions for damages, such as *actio furti*, etc., *Dig.* 27, 3, 9, 7.

[486] *Civil code*, 1804, 1812.

[487] *Civil code*, 450, 457.

[488] *Inst.* 1, 14, 3; Sohm (Ledlie[3]), *Roman law*, p. 488.

[489] See *Dig.* 27, 10, 7, pr.

[490] *Civil code* of France, 450; Germany, 1794; Terry, *Common Law*, p. 690; Williams, *Inst. of Justinian*[2], p. 32.

[491] See *Dig.* 27, 7, 8, 1. The guardian's heir might, if he failed to produce the papers, be subject to suit, — *Code*, 5, 53, 4.

[492] Robinson, *El. law*[2], § 185; *Civil code* of France, 471; Germany, 1802, 1840; Spain, 279 et seq.; Japan, 937.

§518 **Guardianship a public duty: exemptions (excusationes) relieving therefrom.** Roman law treated the office of guardianship as a public burden or duty (*munus publicum*). No one could refuse to act as a guardian, unless relieved by certain legal exemptions. These excuses were applicable to both forms of Roman guardianship.[493] The principal exemptions were as follows: (1) Having 3 living children at Rome, or 4 in Italy, or 5 in the provinces.[494] Children who had died in military service were counted as if alive. Spanish law is like the Roman, — having 5 children is an excuse.[495]

(2) Being over 70 years of age.[496] The Spanish law reduces the limit to 60 years, — over 60 is an excuse.[497] (3) Absence from home on affairs of state or public business.[498] This is also an excuse in Spanish law,[499] but not in English law.[500] (4) Holding a governmental office.[501] (5) Giving public instruction in the arts and sciences, or being a practising physician.[502]

(6) Three burdens of guardianship at one time.[503] In Spanish law one burden of guardianship on hand is an excuse from taking up a second.[504] (7) Poverty.[505] This is also an excuse in Spanish law,[506] and probably in English law.[507] (8)

[493] *Inst.* 1, 25; *Code*, 5, 62; Hunter, *Roman law*[4], p. 735. Primarily these exemptions concerned the tutorship (infra §522), but were usually applicable to the curatorship (infra §531.).

[494] *Inst.* 1, 25, pr.; *Code*, 5, 66, 1.

[495] *Civil code*, 244.

[496] *Inst.* 1, 25, 13; *Code*, 5, 67 (68).

[497] *Civil Code*, 244.

[498] *Inst.* 1, 25, 2; *Code*, 5, 64, 2.

[499] *Civil code*, 244.

[500] Williams, *Inst.* of *Justinian*[2], p. 42.

[501] *Inst.* 1, 25, 3; *Dig.* 27, 1, 17, 5 (magistrates); *Dig.* 27, 1, 30 (jurisconsults serving in the Emperor's council). See also *Dig.* 4, 4, 11, 2; *Inst.* 1, 25, 1 and *Dig.* 27, 1, frag. 22, frag. 41, pr. and §1 (administrator of the property of the Imperial treasury or of the Emperor).

[502] *Inst.* 1, 25, 15; *Code*, 10, 53 (52) "De professoribus et medicis," 6. See Hunter, *Roman law*[4], pp. 719–20.

[503] *Inst.* 1, 25, 5; *Code*, 5, 69.

[504] *Civil code*, 244.

[505] *Inst.* 1, 25, 6.

[506] *Civil code*, 244.

[507] Williams, *Inst. of Justinian*[2], pp. 46, 43.

Ill-health.[508] This is also an excuse in Spanish law.[509] (9) Illiteracy.[510] This is also an excuse in Spanish law.[511]

State control over guardianships. Although not so pronounced as in modern law, such control was present in Roman law. A special court having jurisdiction over guardianship matters — the *praetor tutelaris* — was created either by the Emperor Hadrian or Marcus Aurelius.[512] The State might appoint guardians.[513] The State required the guardian to give security against maladministration[514]; and punished him for failure to make an inventory.[515] By the Emperor Severus was introduced the rule that no alienation of the ward's property could take place without the sanction of the State.[516] In some cases the State might perform the duty of removing a guardian.[517] § 519

The two kinds of guardianship. In Roman law, guardianship was of two kinds: tutorship (tutela) and curatorship (curatio). In a general way these terms connote the authority of the guardian over the person subjected to guardianship; the authority exercised by a guardian known as tutor was usually far more extensive than that belonging to a guardian known as curator. § 520

(1) Tutorship (Tutela)

Scope of the tutela. In Roman law there were two kinds of tutela: one for persons under the age of puberty, which § 521

[508] *Inst.* 1, 25, 7; *Code*, 5, 68 (67). [509] *Civil code*, 244.

[510] *Inst.* 1, 25, 8. For other excuses, see *Dig.* 27, 1, 46, 2; *Inst.* 1, 25, 9; *Dig.* 27, 1, 12, 1.

[511] *Civil code*, 244.

[512] *Vat. Fragm.* 244 (Hadrian); Capitolinus, *Marcus*, 10 (M. Aurelius). The Roman jurists Ulpian and Paulus wrote books on the functions of the *praetor tutelaris* (*Dig.* 27, 1, 3, 5, 9; *Vat. Fragm.*, 244).

[513] See infra § 525.

[514] Gaius, 1, 199; *Inst.* 1, 24; *Code*, 5, 42. If inadequate security was taken from appointive guardians (infra § 526), or such guardians became insolvent, the subordinate court officials of the appointing magistrate were liable: *Code*, 5, 75, 4–5; *Inst.* 1, 24, 4.

[515] See supra § 517.

[516] *Dig.* 27, 9, 1, pr. and § 2. See also *Code*, 5, 71; *Code*, 5, 72, 4; *Code*, 5, 37, 22.

[517] *Dig.* 26, 10, 3, 4.

form of guardianship existed in the law of Justinian and has exerted a large influence on modern law; the other for women, which form of guardianship is not found in Justinian's time.

A. TUTELA IMPUBERUM

§ 522 **Nature of the tutorship, or the guardianship of persons under the age of puberty (14 years for men).** Every sui juris[518] person of either sex below the age of puberty, that is, 14 years for males and 12 for females,[519] must have a guardian for his or her protection.[520] This guardian was called *tutor*,[521] and the ward or person subject to this kind of guardianship, *pupillus*.[522]

§ 523 **The classes of tutors: (1) testamentary guardians (tutores testamentarii).** According to the modes of their appointment tutors were of four classes: testamentary guardians, statutory guardians, guardians appointed by the courts, fiduciary guardians. Testamentary guardians were appointed by the paterfamilias' will.[523] To make the appointment valid, the ward must be alieni juris until the father's death and become sui juris only by such death.[524]

The English Common Law allows as to minor children testamentary guardians, which, however, differ in some details from the Roman law testamentary guardians.[525] In certain cases, too, in the modern law of England, a mother may appoint a guardian by will.[526] In England and America, by force of statute, a father (and in most places a mother, if the father is dead) may appoint a guardian for a child by deed or will, which guardianship may be made to last until the child comes of age or for a shorter time. Such guardians are called —

[518] See supra § 514.

[519] See supra § 467.

[520] See *Inst.* 1, 13, 1–3.

[521] See Gaius, 1, 144; *Inst.* 1, 13, 2; Ulpian, *Reg.* 11, 1.

[522] *Inst.* 1, 24, 1; Ulpian, *Reg.* 11, 25. Sometimes the ward was called *impubes*. The word *minor* referred to a person under curatorship (infra § 531).

[523] Gaius, 1, 144; *Inst.* 1, 13, 3.

[524] Gaius, 1, 146; *Inst. Id.*

[525] Williams. *Inst. of Justinian*[2], p. 32; Terry, *Common Law*, p. 690.

[526] 49 and 50 Victoria, c. 27.

rather loosely — guardians by statute, but more properly — inasmuch as they are appointed by will — testamentary guardians.[527]

(2) **Statutory guardians (tutores legitimi).** These were so called because appointed by operation of law when there was no testamentary appointment.[528] By the Law of the XII Tables this appointment fell on the agnates, and, failing them, the cognates *gentilice*. In Justinianean Roman law it fell on the nearest capable ascendant. § 524

In French law the guardianship of ascendants goes to the nearest ascendant, the paternal relative being preferred to the maternal relative.[529] The only partial counterpart in English law to the Roman statutory guardianship is the ancient English law guardianship by nature and guardianship by socage, — both of which may have been suggested by the Roman law statutory guardianship of agnates.[530]

(3) **Guardians appointed by the courts (tutores dativi).** In default of testamentary or statutory guardians the proper Roman magistrate — such as the praetor, provincial governor, or municipal magistrate — could appoint guardians, either temporarily or to fill a vacancy.[531] § 525

In Spanish law this class of guardians is found; they are appointed by the municipal judge on request of a family council held before him.[532] In Anglo-American law, guardians *ad litem* as well as guardians of minors are judicially appointed guardians. The long standing jurisdiction of the English Court of Chancery over infants — often delegated

[527] Terry, *Common Law*, p. 690.

[528] Gaius, 1, 155 et seq.; *Inst.* 1, titles 15–19; *Dig.* 26, 4; *Code*, 5, 30; *Nov.* 118, 5.

[529] *Civil code*, 402–5.

[530] Williams, *Inst. of Justinian*[2], p. 34; Stephen, *Commentaries*, vol. ii, bk. 3, ch. 4.

[531] Gaius, 1, 184 et seq.; *Inst.* 1, 20; *Dig.* 26, 5; *Code*, 5, 34; Ulpian, *Reg.* 11, 18 et seq. Although Gaius calls *testamentary* guardians "dativi" (Gaius I, 154), yet in the law of Justinian this word is used only to designate guardians appointed by magistrates. This class of guardians was introduced at Rome by the *lex Atilia* (prior to 186 B.C.), and established in the provinces by the *lex Julia et Titia* (31 B.C.).

[532] *Civil code*, 231–2.

in the United States to a surrogate court or court of probate — is probably borrowed from the Roman praetor's jurisdiction over the same class of persons.[533]

§ 526 (4) **Fiduciary guardians (tutores fiduciarii).** Fathers had to act as guardians for their emancipated sons not of full age, and masters for their manumitted slaves.[534] This was often called, in Early Imperial Roman law, fiduciary guardianship, and the guardian, fiduciary tutor.[535] But in Justinian's time the tutor fiduciarius meant the person formerly in power of a deceased paterfamilias but emancipated in his lifetime — and hence entitled to act as guardian over his sons, brothers or sisters, or other lineal relatives.[536] In other words fiduciary guardianship became really a kind of statutory guardianship.[537] The Anglo-American limited power of control exercisable by the father or mother over children "emancipated" or given their time,[538] is slightly reminiscent of the earlier Roman conception of fiduciary guardianship.[539]

§ 527 **Rights and duties of tutors.** The duties common to all guardians, whether tutors or curators, have already been considered.[540] The special powers of a tutor were determinable when the degree of incapacity of the ward is established — the younger the ward, the greater the authority of the tutor. (1) If the ward is under 7 years of age (*infans*), the tutor acted in his own name for the ward.[541] The ward could not perform by himself, even with the tutor's consent, any legal act.

(2) After the ward is 7 years old, he has mental intelligence but not judgment. Then the tutor acted with him by adding his authority, thus making the act of the pupillus a legal transaction binding both the ward and the person

[533] See Williams, *Inst. of Justinian*[2], p. 36.

[534] See supra §§ 434, 446.

[535] See Gaius, 1, 166–7; Hunter, *Roman law*[4], p. 213; *Inst.* 1, 12, 6.

[536] *Inst.* 1, 19, pr.; *Code*, 5, 30, 5.

[537] *Code*, 5, 30, 5; supra § 524.

[538] See supra § 448.

[539] Williams, *Inst. of Justinian*[2], pp. 35 36.

[540] Supra § 517.

[541] Gaius, 3, 107–9; *Inst.* 3, 19, 9 and 10; *Dig.* 26, 7, frag. 1, § 2 and frag. 2; Hunter, *Roman law*[4], p. 701.

with whom he dealt.[542] The authority of the tutor was, however, unnecessary in two cases: release of the ward from obligations, and acquisition by the ward of rights of inheritance or succession.[543]

But all contracts entered into by the ward without the guardian's authority bound him only so far as these were beneficial; for the ward could never make his condition worse,[544] and could always be restored through the courts to his previous condition (*in integrum restitutio*[545]). In Anglo-American law the rule is practically like the Roman: all contracts by infants made to his prejudice or disadvantage are void, all others are voidable at his election.[546]

B. TUTELA MULIERUM

Nature of the guardianship of women. It did not exist in the law of Justinian. According to Republican and Early Imperial Roman law a woman could have no legal independence. If she escaped the marital power,[547] she was still subject to the paternal power, and if that was dissolved,[548] she was under "perpetual" guardianship.[549] Or as Gaius says: "Whatever their age and notwithstanding their marriage, if they are females . . . according to our ancestors, even women who have reached their majority, on account of their levity of disposition, require to be kept in tutela." [550] This tutela was originally exercised by a woman's agnates.[551] § 528

But this guardianship of women had become attenuated at the close of the Republic.[552] And Gaius himself records

[542] *Inst.* 1, 21, 2.

[543] *Inst.* 1, 21, pr. and 1; *Dig.* 26, 8, 9, pr.

[544] *Inst.* 1, 21, pr.

[545] See supra §§ 449.

[546] Williams, *Inst. of Justinian*, pp. 31, 38; Stephen, *Commentaries*, vol. ii, book 3, ch. 4.

[547] Supra § 470.

[548] Supra § 514.

[549] Gaius, 1, 190. But Vestal Virgins were not in tutela, Gaius, 1, 145.

[550] Gaius, 1, 144 (Poste).

[551] Gaius, 1, 157.

[552] Cicero, *Pro Murena*, 27. See also Gaius, 1, 148–54; Hunter, *Roman law*[4], p. 729.

how a woman's guardian might be forced to give his authority to her acts,[553] and that the Emperor Claudius abolished the statutory guardianship of agnates over women.[554] During the Early Empire there was always another sure way of escaping the tutela: if a free-born woman had 3, or a freed woman 4 children, legitimate or illegitimate.[555] Although Constantine revived the agnate's guardianship of women,[556] yet three-quarters of a century after his death the guardianship of women definitely disappeared as a result of legislation of Honorius and Theodosius,[557] and is not found at all in the law of Justinian.

(2) Curatorship (Curatio,[558] Cura,[559] Curatela[560])

§ 529 **Nature of the curatorship, or the guardianship of persons beyond the age of puberty.** Every sui juris[561] person of either sex beyond the age of puberty, who is regarded as too immature to manage his affairs or who is actually incapable or unfit to do so, must have a guardian for his or her protection. This guardian was called *curator*.[562] The curatee or person subject to this kind of guardianship was called *minor*[563] or *adolescens*[564] (if merely immature), or *interdicted*[565] (if incapable or unfit).

§ 530 **Curators were general or special. Rights and duties of curators.** In Roman law there were two classes of curators: general and special: a general curator was one appointed over the entire estate of the curatee[566]; a special curator[567] was one appointed for a particular transaction, such as a

[553] Gaius, 1, 114–15.

[554] In A.D. 47, — Gaius, 1, 157.

[555] Gaius, 1, 194 (the so-called *jus liberorum*).

[556] *Code*, 5, 30, 3.

[557] *Code*, 8, 58, 1 (A.D. 410) granting to every woman the *jus liberorum*.

[558] "Curatio" is used by Gaius and Justinian: e.g., Gaius, 1, 142; *Inst.* 1, 13, pr.

[559] "Cura" is used in the Vatican Fragments and also by Justinian: e.g., *Vat. Frag.* 125; *Dig.* 27, 1, 41, pr.; *Inst.* 1, 25, 5.

[560] "Curatela" is medieval Latin, and not a Roman word.

[561] Supra § 514.

[562] See *Inst.* 1, 23.

[563] See *Dig.* 4, 4.

[564] *Inst.* 1, 24, 1.

[565] See Ulpian, *Reg.* 20, 13; *Reg.* 12, 2.

[566] See infra § 531.

[567] *Id.*

curator *ad litem*.[568] The Anglo-American guardian *ad litem* serves the same purpose as the Roman.

The duties common to all guardians, whether curators or tutors, have already been considered.[569] The special powers of a curator varied with the nature of the curatorship. The curator of a minor was less powerful than the curator of an interdicted person. Not until the Later Empire was the consent of the curator of a minor required for any transaction, and then only for acts disadvantageous to the minor[570]; otherwise the ancient right of the minor remained unimpaired — he could legally act without the curator's consent,[571] subject to restoration to his previous condition (*in integrum restitutio*) if damaged.[572] But the curator of an idiot or insane person always had full control and administration over his estate[573]; and usually the curator of a spendthrift had also the same right.[574]

§ 531 **The curatorship of minors under 25 years of age (curatio minorum XXV annis), or the guardianship of persons between the age of puberty and the age of majority.** During the Republic it was gradually recognized that a sui juris[575] person over the age of puberty (14 years for men[576]) but below the age of majority (25 years[577]) needs some protection. The problem was, how to make a minor voluntarily obtain such protection through a modified form of guardianship. And its solution was slowly worked out.

[568] Other instances of a *curator ad hoc* were *ad dotem constituendam* and *ad alimenta praestanda*. See *Inst.* 1, 23, 2; *Code*, 5, 44, 3; *Code*, 5, 12, 28; *Dig.* 27, 2, 6.

[569] Supra § 517.

[570] See infra § 531.

[571] *Dig.* 45, 1, 101; *Dig.* 34, 3, 20, 1; *Dig.* 4, 4, 16, pr.; *Dig.* 14, 6, 3, 2; *Code*, 6, 30, 12.

[572] *Dig.* 4, 4, frag. 1, frag. 29, pr., frag. 47; *Code*, 2, 21 (22), 3–5; *Code*, 2, 24 (25); supra § 449.

[573] *Dig.* 27, 10, 10, pr.; *Code*, 2, 22, 3; *Dig.* 18, 1, 26. See also *Dig.* 26, 7, 48; *Dig.* 37, 9, 1, §§ 17–24.

[574] Occasionally the transaction justified the spendthrift acting without his curator's consent: *Dig.* 45, 1, 6; *Dig.* 12, 1, 9, 7; *Dig.* 29, 2, 5, 1.

[575] Supra § 514.

[576] As to puberty, see supra § 467.

[577] Supra § 447.

(§531) The first step was taken early in the 2d century B.C.[578] by the enactment of a statute called the *lex Plaetoria*,[579] which made it a criminal offense[580] to defraud or overreach a person less than 25 years old,[581] protected the minor against the injurious consequences of his act,[582] and permitted him to apply in certain cases to the praetor for a curator.[583] Soon this legislation was supplemented by a provision in the edict[584] of the praetor that he would give restoration to former condition (*in integrum restitutio*) to a minor whenever he had suffered loss in cases not involving fraud at all[585] — in other words the praetor relieved against all injurious transactions due to the inexperience of minority.[586]

The result of all this new law was that it became unsafe to deal with a minor, unless he had a curator. Theoretically, the minor's capacity remained entire; practically, a minor found that he could not contract without a curator — it was suspicious to try to make contracts without one. This constituted the pressure brought to bear on the minor to make him desire a curator.[587] But to go to the trouble of getting a *special curator*[588] appointed by a magistrate for each piece

[578] The date is given variously: about 186 B.C., Sohm (Ledlie[4]), *Roman law*, p. 294; about 190 B.C., Girard, *Manuel de dr. rom.*[5], p. 229; 254–184 B.C., Hunter, *Roman law*[4], p. 62.

[579] Or *Laetoria:* Poste, *Gaius*[4], p. 115; Sohm (Ledlie[3]), *Roman law*, p. 295.

[580] "Judicum publicum," — Cicero *De nat. deor.* 3, 30. Opposed to this view of Savigny (*Vermischte Schriften*, 18) is that of Ihering, who holds (*Geist des röm. Rechts*, §52) that the action was not criminal but civil — an *actio popularis*, and cites *Dig.* 26, 10, 1, 6; *Dig.* 12, 2, 30, 3. See also *Inst.* 1, 26, 3.

[581] "Circumscriptio adolescentium," "dolus malus," — Cicero, *De officiis*, 3, 15.

[582] Sohm holds that the minor was given a private action ex delicto for the fraud, *Id.* p. 295, note.

[583] Poste, *Id.*

[584] See supra vol. i, §§ 50, 60.

[585] Poste, *Id.*

[586] See supra § 449 (*in integrum restitutio*). This remedy as a protection against fraud was afterward extended by the praetor to persons of full age (over 25).

[587] See *Inst.* 1, 23, 2.

[588] Supra § 530.

of business as it arose,[589] must have been a tedious process. And in the latter half of the 2d century A.D. the Emperor Marcus Aurelius facilitated the appointment of curators by enacting that any minor who desired could obtain from the praetor a *general curator*.[590]

Finally, less than a half century later, in the reign of Severus the curator of a minor (and not the minor himself) had the general administration of the minor's property[591]; the minor provided with a curator must retain him until he reaches his majority or full age of 25 years[592]; and the minor under curatorship could no longer obtain restoration to his former condition (*in integrum restitutio*), unless he proved an injury.[593]

This enlarged curatorship of minors descended into the law of the Later Empire. And the Emperor Diocletian enacted that a minor should be incapable of making his condition worse without the consent of his curator.[594] In Justinian's time, general as well as special curators were obtainable by a minor at his option. But there were three cases where the minor must always secure a curator by judicial appointment: (1) to engage in a lawsuit[595]; (2) to receive payment of a debt[596]; (3) to receive an account of administration from his former tutor.[597]

§ 532 **The guardianship of modern law combines both the Roman tutorship of persons under puberty and the Roman curatorship of persons under majority.** As to sane and capable persons, the jurisprudence of modern civilized countries has

[589] "Certa causa": *Inst.* 1, 23, 2.

[590] Capitolinus, *M. Antonini vita*, 10: "ita statuit ut omnes adulti curatores acciperent non redditis causis." See supra § 530. But Roby, *Roman private law*, vol. i, p. 124, note 3, holds that Capolinus is "not very satisfactory" authority.

[591] *Dig.* 4, 4, 1, 3 (Ulpian).

[592] *Dig.* 4, 4, 1, 3 (Ulpian).

[593] See *Dig.* 45, 1, 101; supra § 530.

[594] *Code*, 2, 21, 5 and 3.

[595] *Inst.* 1, 23, 2; *Code*, 5, 31, 1; *Code*, 5, 34, 11.

[596] *Dig.* 4, 4, frag. 7, § 2, frag. 27, §§ 1–2, frag. 32.

[597] *Code*, 5, 31, 7; *Dig.* 26, 7, 5, 5. See supra § 518; Mackeldey (Dropsie), *Roman law*[14], § 640.

combined the minority of the curatorship with the wardship of the tutorship — guardianship in modern law being usually terminated by the person subject to guardianship reaching majority.[598]

Blackstone recognizes that the English guardian fills the offices of both tutor and curator.[599] The term "curator" has survived in the law of England for a special use.[600] In England "it is not uncommon for the full enjoyment of property to be postponed in a will or settlement until the person entitled attains the age of 25." [601] This is curiously reminiscent of the Roman rule that at 25 years of age all guardianship — the curatorship [602] — ceases. In Scotch law the terms "tutor," "curator," and "pupil" are still technical terms used largely as in Roman law.[603]

§ 533 **The curatorship of idiots, lunatics, judicially-declared spendthrifts, and other incapable persons.** Guardianship of insane persons (*furiosi*) or spendthrifts (*prodigi*) was of very ancient origin in Roman law, having been established by the Law of the XII Tables.[604] Subsequently the curatorship became extended to all demented persons (*mente capti, fatui, stulti*) [605]; for they must have guardians.[606] Originally the curatorship of lunatics was statutory, devolving upon the agnates [607]; but in the law of Justinian the curator — usually the next of kin [608] — was appointed by a magistrate.[609]

[598] See supra § 447.

[599] *Comm.* vol. i, p. 460.

[600] "The person to whom the interest of a convicted felon in his property in some cases passes" 33 and 34 Vict. c. 23): see Williams, *Inst. of Justinian*[2], p. 31.

[601] Williams, *Inst. of Justinian*[2], p. 32, note 1.

[602] Supra § 531.

[603] Williams, *Inst. of Justinian*[2], p. 31.

[604] Table 5, 7. See supra § 445.

[605] *Inst.* 1, 23, 3–4; *Dig.* 27, 10, 1, pr.; *Code*, 5, 70, 1.

[606] If *sui juris* (*supra* § 514) or not in *tutela* (supra § 523): *Dig.* 27, 10, 14; *Dig.* 27, 1, 1, 5; *Code*, 5, 34, 2.

[607] Supra § 463.

[608] *Dig.* 27, 10, 16; *Code*, 5, 70, 5 and 7; §§ 5–6; *Code*, 1, 4, 27; *Dig.* 27, 10, 2–4; Ulpian, *Frag.* 12, 2.

[609] *Inst.* 1, 23, 3–4.

In order to provide a spendthrift with a curator, he must be judicially prohibited, after an investigation, from managing his affairs.[610] In the law of Justinian the curatorship of spendthrifts, originally statutory and belonging to the agnates,[611] was appointive by the proper magistrate and normally went to the next of kin.[612] Roman law also provided that persons who were unable to manage their property owing to deafness, dumbness, blindness, or some serious chronic disease, might apply for and obtain a curator to serve as long as was necessary.[613]

Survival of the guardianship of insane and incapable persons in modern law. This survival is world-wide. The insane, demented, spendthrifts, and other unfortunate persons — even when over the age of majority — are protected in modern law by guardians,[614] as in Roman law.[615] For instance French, German, Spanish, and Japanese law provides for the guardianship of the insane, weak-minded, spendthrifts, deaf, dumb, blind, and other persons unable to manage their affairs.[616] § 534

In England, at Common Law, the King as *parens patriae* is the guardian of all idiots and lunatics, which function he exercises through some court, for instance Chancery. In the United States the State takes the place of the King, and acts through the courts of equity or of probate. If the insane person has property, a judicial inquiry into his sanity results in a guardian (or, to use the other names, "conservator," "committee") being appointed to take charge of his property and often his person.[617]

In regard to spendthrifts the law of Scotland is the same as the Roman law; but English law does not take jurisdiction over such persons unless practically aberration of mind

[610] Ulpian, *Reg.* 12, 2, and 3: "cui bonis interdictum est."

[611] *XII Tables*, 5, 7.

[612] Ulpian, *Reg.* 12, 3; *Inst.* 1, 23, 3–4; *Dig.* 27, 10, frag, 1, pr. and frag. 13.

[613] *Inst.* 1, 23, 4; *Dig.* 27, 10, 2.

[614] Frequently the word *curator* is employed to designate such a guardian.

[615] Supra § 533.

[616] *Civil code* of France, 489, 502, 936; Germany, 1896, 1910; Spain, 213, 220–21; Japan, 900, 911, 912.

[617] Terry, *Common Law*, p. 704.

exists.[618] In most places a "guardian" (or "conservator," or "committee") may be appointed for the property of a person who is a spendthrift and squanders his property.[619] Persons who are deaf, dumb, or blind are not ipso facto protected by guardianship in English law, although so protected in Roman law.[620]

§ 535 **Miscellaneous curatorships: curator in bankruptcy, curator ventris. Their survival in modern law.** After the analogy of the curator for incapables, were constituted in Roman law the curator of a bankrupt's estate (*curator bonis dando*[621]), and also the curator of the estate of a child before birth whose mother at the death of her husband is pregnant (*curator ventris*[622]). Both of these were custodians of property.[623]

The Roman *curator ventris* has modern descendants, for instance in French, German, English, and American law[624] — the French *curateur au ventre* and the Anglo-American guardian for a child *en ventre sa mère* portray their Roman origin. Moreover, the Roman conception of a curator for the estate of a bankrupt has exerted a large influence in modern law: for instance as to the English and American trustee or assignee in bankruptcy.

[618] Williams, *Inst. of Justinian*[2], p. 41.

[619] Terry, *Common Law*, p. 704.

[620] Supra § 533.

[621] *Dig.* 42, 7, 2, pr.; Mackeldey (Dropsie), *Roman law*[14], §§ 524, 525.

[622] *Dig.* 37, 9, 1, §§ 17–24; *Dig.* 26, 5, 20; *Dig.* 27, 10, 8; *Dig.* 26, 7, 48.

[623] For other curatorships, of small importance, see Mackeldey, *Id.* § 644.

[624] *Civil code* of France, 393; Germany, 1912; Blackstone, *Commentaries*, vol. i, p. 130; Robinson, *Am. jurisprudence*, § 17; 15 Pickering's Reports (Mass.), p. 255.

TITLE II

ARTIFICIAL PERSONS

CHAPTER I

INTRODUCTION

Artificial person or a corporation defined. Artificial persons are creatures of the law; their very existence is owed to the law alone. Hence artificial persons are unlike natural persons,[1] for the latter's existence is independent of the law. To Roman law is due the development of artificial persons as found in modern law. Artificial persons are frequently called in modern law "juristic" or "juridical" persons.[2] § 536

In Roman and also in modern law a corporation has two grand characteristics. (1) A personality entirely distinct from the natural persons who are its members. "What is owed to the corporation is not owed to the individual members, and what the corporation owes the individual members do not owe," is the Roman jurist Ulpian's forceful illustration of this principle.[3] Furthermore, this independent corporate identity remains the same even if a complete change of membership should occur.[4] (2) Duration of existence beyond the natural period of human life. Sometimes an artificial person receives from the law perpetual legal capacity.

Origin and development of Roman corporations. The conception of artificial personality is a product of an advanced stage of legal development. It is not self-evident to primitive peoples. Although in ancient Roman times there existed clubs and trade-guilds,[5] yet these had no true legal § 537

[1] Supra §§ 431 et seq. The subject of artificial persons ought to follow that of natural persons; and such is the order of treatment pursued in the *Civil code* of Louisiana (427–47) and of Quebec (352–73).

[2] See Holland, Jurisprudence, ch. 8; Robinson, *Am. jurisprudence*, § 71; Lönholm, *Japanese civil code*, 33; Walton, *Spanish civil code*, 35.

[3] *Dig.* 3, 4, 7, 1 (Monro).

[4] *Dig.* 3, 4, 7, 2.

[5] *Law of XII Tables*, viii, 27 (449 B.C.). See *Dig.* 47, 22, 4.

personality—for their property belonged to the individual members and not to the association itself. Unknown to Ancient Roman law was the idea that an artificial person could exist and possess proprietary rights[6]; the law for citizens (jus civile) did not concern itself with other than natural persons. Property of the State — public property — was regarded as entirely beyond the range of ordinary commercial dealings; it was *res extra commercium*.[7]

Recognition of artificial personality did not occur in Roman law during the Republic. The conception of an artificial or juristic person is a product of the Roman law of the Empire.[8] The earliest Roman corporation was the public corporation.[9] Private corporations were modeled on the public corporation,[10] but "shaped with a freer hand."[11] Towards the close of the Republic the Romans had developed a system of municipal government; public property to a very large extent was brought within the range of private law. After the example of the public corporation, proprietary capacity was extended to lawful private associations.[12]

§ 538 **Classes of Roman corporations: (1) public corporations.** In Roman law there were six classes of corporations: public corporations, religious associations, charitable foundations, commercial companies and industrial associations, political clubs, social and mutual benefit associations. Not all of these were true corporations — some merely resemble an artificial person. The Roman classes of corporations have their counterparts in modern law.

Public corporations fulfill the purpose of government; they are political bodies — such as the State,[13] city, town.

[6] See Sohm (Ledlie[3]), *Roman law*, pp. 187–8.

[7] Sohm, *Id.*

[8] Sohm, *Id.* p. 189.

[9] See infra §§ 538, 539.

[10] *Dig.* 3, 4, 1, 1: "ad exemplum rei publicae."

[11] Baldwin, *Modern political institutions*, p. 142.

[12] Sohm, *Id.* pp. 189–90.

[13] The Roman *fiscus* was the State in its proprietary capacity, the State as a legal person: Paulus, *Sent.* 5, 12; *Dig.* 49, 14; *Code*, 10, 1; *Cod. Theod.* 10, 1.

The earliest Roman corporation was the municipal.[14] In both Roman and modern law the true distinction between public and private corporations is this: the former possess governmental powers, the latter do not. Private corporations are organized either for some private purpose or for the welfare of the general public.

§ 539 (2) **Religious associations.** The earliest of all Roman associations were probably the religious.[15] Some of them were created by the State to maintain the national religion of Rome — such as the colleges of priests and vestal virgins.[16] These were really official public corporations. But it should be remembered that in the pagan age of Rome every private corporation was in a sense a religious corporation, with its patron deity. For instance the early *collegium mercatorum*, established about 495 B.C., was probably originally organized for a religious purpose — the worship of Mercury, the patron deity of merchants.[17]

§ 540 (3) **Eleemosynary corporations or charitable foundations (piae causae).** During the Empire were developed many varieties of eleemosynary corporations or charitable foundations — a sort of offshoot from religious corporations, and originally established under the auspices of the State. These were quasi-public corporations. Some of the early Emperors established charitable foundations for Italy, whereby alms were distributed to poor children. These, however, were State institutions, belonging to the *fiscus* or property of the State. No private individual could dedicate a foundation with separate property.[18] Indirectly, however, he could accomplish this by a gift or legacy of property to some municipal

[14] Municipal corporations are separately treated infra §§ 908–12.

[15] "Collegia templorum," as they are called in pagan Roman law, were of very great antiquity. Mommsen, *De collegiis*, 1: "Inde ab antiquissimis temporibus fuerunt in populo Romano coetus rei sacrae causa constituti . . . qui coetus dicebantur sodalitates . . . iisque qui intererant sodales, nominati jam in lege XII Tabularum."

[16] See *Dig.* 32, 38, 6. For private religious associations carrying out some public service, see Waltzing, *Étude sur les corp. prof., etc.*, vol. i, p. 34.

[17] See Livy, 2, 27.

[18] Sohm (Ledlie[3]), *Roman law*, p. 196.

corporation (a city, for example), with directions how the property should be used.[19]

But when Christianity conquered the Roman Empire,[20] individuals were enabled — from the 5th century onward — by appropriate legislation to create charitable foundations and to endow them with separate property.[21] Such a charitable endowment was then called a *pia causa*.[22] When founded by gift or will, such endowments were regarded by the Later Imperial Roman law as a species of church property, to be administered by the bishop or his representative.[23] Property dedicated to the administration of charity in favor of the poor, the sick, prisoners, orphans, or aged people constituted a poorhouse, hospital, orphanage, or asylum, which shared the corporate capacity granted by late Roman law to all ecclesiastical institutions.[24]

§ 541 (4) **Commercial companies and industrial associations.** There were many varieties of Roman private corporations organized for purposes of business, trade, or industry. Associations for commerce and trade existed at Rome at a very early date. That these were the oldest known to Roman law is not yet settled: but it is certain that they were of very great antiquity. The Roman tradition was that they were invented by Numa,[25] who was the traditional second King of Rome. They were well-known in the reign of Servius Tullius,[26] to whom tradition credited certain improvements in their organization.

Roman private corporations of a commercial nature were either organizations for trade and business — commercial

[19] Sohm (Ledlie[3]), *Roman law*, p. 195. These philanthropic movements during the Early Empire were due to the influence of Greek culture and philosophy, see supra vol. i, §§ 63 et seq.

[20] See supra vol. i, §§ 144 et seq.

[21] Sohm, *Id.* p. 197.

[22] Or *pium corpus*, Sohm, *Id.*

[23] See Sohm, *Id.* p. 198.

[24] See *Code*, 1, 3, 48 (49), 1–2; *Code*, 1, 2, 19; *Code*, 1, 3, 46 (47); *Nov.* 120, ch. 1, 2, ch. 6, 2; *Code*, 1, 3, 35 (36); Mackeldey (Dropsie), *Roman law*[14], § 157.

[25] Plutarch, *Life of Numa*.

[26] Waltzing, *Id.* vol. i, p. 63, note. 4.

companies,[27] or organizations of artisans — industrial associations like the modern trades-union.[28] The associations of scribes[29] and other official bodies,[30] although partaking of the nature of a private corporation, were really quasi-public corporations.[31]

(5) **Political clubs.** These societies[32] were a manifestation of that spirit of club-life which at one time was very rampant at Rome. Clubs of all sorts — religious, social, political, and even anarchical — flourished exuberantly during the last century of the Republic.[33] Political clubs were perversions of social or religious clubs; the original purposes of their organization — feasting or worship — became subsequently transformed into political purposes and developed into instruments of intrigue. By a statute of Augustus all political clubs were dissolved and were thereafter prohibited. Political clubs were never corporations in the strict sense of being artificial persons. And they were dissolved at a time when the conception of juristic personality was just beginning to be applied to private associations.[34] § 542

(6) **Social and mutual benefit associations.** These very numerous Roman societies[35] were not true corporations. Although the law of the Empire greatly restricted the long-standing Roman right to form associations,[36] yet it made one exception: the early Emperors extended much favor to mutual benefit associations providing burial for their members.[37] These burial associations were organized on a fraternal and social basis. They met monthly. They established relief § 543

[27] See *Dig.* 4, 2, 9, 1; *Dig.* 3, 4, 1, pr.

[28] *Id.*

[29] *Scribae.*

[30] Such as the *decuriae librariorum, fiscalium, censualium, etc.*

[31] See *Dig.* 4, 2, 9, 1.

[32] *Sodalitates, factiones.*

[33] Cicero, *Pro Planco*, 15, 36; Pliny, *Hist. Nat.* 36, § 116. See *Dig.* 47, 22, 1.

[34] See supra § 537.

[35] As to these see Dill, *Roman society from Nero to Marcus Aurelius*, p. 265, London, 1905; *Dig.* 47, 22, 1.

[36] See infra § 547.

[37] The *collegia tenuiorum.* See *Dig.* 47, 22, 1, pr.; Mommsen, *De collegiis*, pp. 81–2; Colquhoun, *Roman law*, § 872.

funds which were obtained by payment of monthly dues assessed on each member. Their membership was not confined to citizens: foreigners, freedmen, and sometimes even slaves could become members.

§ 544 **Words employed in Roman law to denote a corporation.** The strictly technical generic expression for the conception of corporation is **universitas.**[38] Ordinarily the term **corpus** is used to denote a corporation[39]; and this expression is open to the least misconception. The word **corporatio** is occasionally used to signify a corporation.[40]

The term **collegium** is employed in the oldest known Roman corporation inscription.[41] Collegium was originally used to denote merely a voluntary association (which resembles, but is not legally, a corporation). Collegium emphasized the individual relationship of the members. The earliest Roman associations — those instituted for religious purposes — were called collegia.[42] The early Roman trade-guild was called collegium long before it acquired legal personality. When voluntary associations became true corporations, the old name was retained and in process of time became very widely extended: it finally designates all private and certain quasi-public corporations.[43]

Societas was originally a term applied to industrial associations prior to incorporation. But after incorporation the original name is retained.[44] Frequently 'societies' are also called collegia. Private corporations for trade and commerce are frequently referred to in the plural by the word designating their members, for instance *fabri aerarii* (the bronze workers), *pistores* (the bakers), *navicularii* (the seamen). **Sodalitates, sodalitia, factiones** refer to clubs.[45]

[38] See *Dig.* 2, 4, 10, 4; *Dig.* 46, 8, 9; infra § 545.

[39] Smith, *Dict. of Antiq.*[3], "universitas," vol. ii, p. 979; *Dig.* 47, 22 (title).

[40] *Nov. Severus*, 2; Smith, *Id.*

[41] Waltzing, *Étude hist. sur les corporations professionnelles chez les romains*, vol. iii, p. 1.

[42] Supra § 539.

[43] See for instance, *Dig.* 47, 22, "De collegiis," *etc.*

[44] "Societas" is used, for instance, in *Dig.* 46, 1, 22; *Dig.* 3, 4, 1, 1.

[45] See for instance *Dig.* 47, 22, frag. 1, pr.; frag. 4; *Dig.* 49, 1, 16.

CHAPTER II

PRIVATE CORPORATIONS

Economic and political reasons for the development of Roman private corporations. The private corporation was a Roman device for carrying out a big undertaking which no man could do in his lifetime. The corporation in the Roman world served two purposes. (1) *Commercially*, it enabled the upper or 'noble' classes to invest money in business or mercantile pursuits without incurring any stigma of being personally engaged in trade. In Ancient Roman law no citizen could engage in trade without losing his political rights.[46] Senators were prohibited by law from engaging in any mercantile pursuit.[47] Only foreigners and heads of families (acting through their family slaves) could engage in trade.[48] § 545

With the advent of the corporation, not only did the poorer classes form commercial associations, but also the patricians themselves. The 'nobility' could invest money in mercantile and business corporations and grow richer, without disclosing any personal identity and consequently without suffering any disgrace. For the general public did not know whether or not Senators were shareholders in corporations. And, as a matter of fact, Roman 'noblemen' frequently invested in all sorts of corporations: for instance gold mining companies, corporations constructing public works, companies engaged in foreign trade.[49] Plutarch relates that Cato the Censor[50] very shrewdly invested, in the name of his freedman Quintus, a large sum of money — 2% of the company's capital — in a trading company.

[46] Niebuhr, *Hist. of Rome*, vol. i, p. 447.
[47] Mommsen, *Hist. of Rome*, book 3, ch. 12.
[48] Mommsen, *Id.* See *Inst.* 4, 7, 2.
[49] Mommsen, *Id.*; Dig. 3, 4, 1, pr.
[50] See Plutarch, *Marcus Cato.*

(2) *Politically*, the corporation formed, by its united financial strength of many natural persons, a sort of counterbalance to the great patrician household (familia). The corporation was a godsend to the poorer Roman classes. By means of the corporation the plebeians could engage in business and carry out great undertakings on fair terms with the great households of the 'nobility' and their vast retinue of slaves.

The patrician household (familia) comprised a large body of individuals — slaves, clients, and children [51] — all of whom worked under the direction of the head of the family (paterfamilias) and for his benefit. The children were heirs to the succession, which embraced large properties acquired by the labors of the many members of the familia. As heirs they became recognized as a sort of owner, even in the lifetime of the paterfamilias.[52] Their inheritance — all the estate, both assets and debts — was called *universitas*.[53] And it is highly significant that, when corporations were invented, the Romans used this same word "universitas" to denote a corporation.[54] Not until the private corporation was developed, could the enormous political influence of the patrician familia be withstood, except by some other familia.

§ 546 **Creation of corporations: (1) during the Republic.** Voluntary associations during the Republic were not, strictly speaking, corporations. True corporate personality was a gift of Imperial Roman law. Under the Republic no restrictions were placed on the right to form associations, until the year 64 B.C.[55] Prior to that time associations could be formed by the voluntary act of the parties, although this freedom was not, however, expressly granted by law [56]; and collegia could govern themselves internally by means of by-laws not violating the law of the State.[57]

[51] See supra § 434 (slaves), § 439 (clients), § 505 (children).

[52] See Dig. 28, 2, 11: "hi domini essent, qui etiam vivo patre quodammodo domini existimantur."

[53] See infra "succession," § 661.

[54] See supra § 544.

[55] Mommsen, *De collegiis*, p. 23; Waltzing, *Corp. professionnelles chez les romains*, vol. i, p. 29.

[56] Mommsen, *Id.* p. 35; Waltzing, *Id.* vol. i, pp. 79, 82–3.

[57] *XII Tables*, viii, 27; Dig. 47, 22, 4.

But in 64 B.C. a statute was passed [58] dissolving practically all associations, except a very few necessary ones — such as trade-guilds.[59] Earlier statutory enactments against corporations, although simply measures of order and police,[60] show the drift of Roman legislation towards restriction and dissolution of associations. Long-continued abuses of power by associations, especially political clubs, had paved the way for the legislation of 64 B.C. dissolving them. Down with 'corporations' was the general cry.[61]

The effect of the statute of 64 B.C. was to abolish freedom to form associations. But six years later a reaction set in through the efforts of the tribune Clodius, and a statute was passed [62] re-establishing the dissolved associations and the old freedom to form associations. A year later a statute was passed to prevent corrupt practices by corporations at elections.[63] Nevertheless the restoration of the old freedom of association was soon followed by recurrence of the old abuses and disorders, which finally became so flagrant in the last years of the Republic, that when Julius Caesar became dictator he abolished all associations except a very few ancient ones.[64]

Creation of corporations: (2) during the Empire. After Caesar's death and the attendant great confusion, numerous §547

[58] The text of the law is lost. It was passed the year before the turmoil of Catiline's conspiracy.

[59] Waltzing, *Id.* vol. i, p. 92; Baldwin, *Mod. political instit.*, p. 147.

[60] *XII Tables*, viii, 26 (449 B.C.), "ne qui in urbe coetus nocturnos agitaret," was a police measure to prevent nocturnal disturbance, — Goodwin, *XII Tables*, p. 66. The *SC. De bacchanalibus* (186 B.C.) was a police measure of protection for the city of Rome against conspiracy by the bacchanalian societies, — Waltzing, *Id.* vol. i, pp. 79 et seq. The *lex Gabinia* (139 B.C.) was a police measure against conspiracy and intrigue: "Deinde lege Gabinia promulgatum qui coitiones ullas clandestinas in urbe conflaverit, more malum capitali supplicio multetur," — Porcius Latro, *Decl. in Catilinam*, 19; Waltzing, *Id.* p. 79.

[61] See Baldwin, *Mod. polit. instit.*, p. 147.

[62] *Lex Clodia de collegiis* (58 B.C.), — Waltzing, *Corp. etc.*, vol. i, p. 96.

[63] *Lex Licinia de sodaliciis* (57 B.C.), — Mommsen, *De collegiis*, pp. 45, 78; Waltzing, *Corp. prof. chez les romains*, vol. i, p. 112.

[64] "Cuncta collegia praeter antiquitus constituta distraxit," — Suetonius, *Div. Julius*, 42; Waltzing, *Corp. etc.*, vol. i, pp. 112–13.

(§547) unlawful associations were again formed. Consequently when Augustus finally became master of the Roman world, he renewed the restrictive policy of his uncle and abolished almost all associations.[65]

But the legislation of Augustus — the *lex Julia de collegiis*[66] — was not merely of a prohibitory character; it also provided for the authorization[67] of associations. As a prerequisite, the application for a franchise must show an object helpful to the State or beneficial to the public.[68] Authorization must be obtained from the Senate, which had to confer with the Emperor before the franchise could be granted; later during the Empire authorization was directly granted by the Emperor in special acts.[69] Soon the Imperial Roman law bestowed the great gift of real juristic personality upon associations duly authorized; the full conception of an artificial person, originally applicable to public corporations, was extended to private associations, thus making them true private corporations.[70]

The spirit of the lex Julia shaped the future Roman law of corporations. Freedom of incorporation without State authorization never existed in the Roman Empire.[71] The legislation of Augustus became the basic corporation law of

[65] "Collegia praeter antiqua et legitima dissolvit," — Suetonius, *Aug.* 32. Waltzing, *Corp. etc.*, vol. i, pp. 115–16.

[66] Herzog holds that there were two statutes, one abolishing the collegia, and a later one regulating for the future the right of incorporation (*Gesch. u. Verf.*, vol. ii, pp. 988, 989 note 1). See Waltzing, *Corp. etc.*, vol. i, pp. 115, 116.

[67] An instance of a duly authorized corporation is given in *Corpus inscript. Latinarum*, vi, 2193: "Dis manibus collegio . . . senatus . . . permisit . . . e lege Julia ex auctoritate Aug." See also Waltzing, *Corp. etc.*, vol. i, p. 116.

[68] Waltzing, *Corp. etc.*, vol. i, pp. 119–20.

[69] Waltzing, *Id.* vol. i, pp. 117–18. See *Dig.* 3, 4, 1: "collegia Romae certa sunt, quorum corpus senatus consultis atque constitutionibus principalibus confirmatum est, veluti pistorum . . . et naviculorum."

[70] *Dig.* 3, 4, 1, 1; Sohm (Ledlie [3]), *Roman law*, pp. 189, 199.

[71] Membership in an illegal corporation was punishable as severely as was armed seizure of public places or temples — in other words as a treasonable offense: *Dig.* 47, 2, 2. The same principle of punishing associations as *seditious* was employed in an expired English statute of George IV (1 Geo. IV, ch. 6), — Williams, *Inst. of Justinian* [2], p. 54.

the Empire, although subsequently confirmed and completed by a long series of statutes of later Emperors.[72] It resulted from these Imperial corporation laws that no corporation under the Empire could exist without the express authority of the State.[73] And modern law is the same as the Roman: the State alone can create corporations.[74]

Corporate membership. At least *three* persons were necessary for the formation of a Roman corporation.[75] This number is commonly required as to a modern corporation aggregate.[76] A Roman corporation, once constituted, remained the same, irrespective of membership changes.[77] And if an existing corporate body was reduced to a single person it could still be maintained.[78] Out of this rule has arisen the doctrine in modern law that a corporation may comprise a single individual, — a corporation sole.[79] § 548

Prior to the 3d century and the reign of Caracalla, a man could be a member in as many corporations as he pleased; but that Emperor[80] provided that no one could be a member in more than one corporation at a time.[81] (There is no such rule in American law.) This remarkable Roman legislation has received several explanations. Mommsen[82] regarded it as limited to burial societies only, and that should be placed elsewhere in the Digest of Justinian. Heineccius[83] regarded

[72] Waltzing, *Corp. etc.*, pp. 121, 122 et seq.

[73] *Dig.* 3, 4, 1, pr. (Gaius); *Dig.* 47, 22, 3, 1 (Marcian). There were but few exceptions to this rule: *Dig.* 50, 6, 6, 12. It is doubtful that a Roman corporation had to have a seal, as required in English law: Williams, *Inst. of Justinian*[2], p. 54; Robinson, *Element. law*[2], § 24.

[74] Robinson, *American jurisprudence*, § 72.

[75] *Dig.* 50, 16, 85: "Neratius Priscus tres facere existimat collegium, et hoc magis sequendum est."

[76] For instance *General statutes* (1902) of Connecticut, § 3358.

[77] *Dig.* 3, 4, 7, 2.

[78] *Id.*

[79] See for instance *Civil code* of Quebec, 354; Robinson, *Am. jurisprudence*, § 88 (England and United States).

[80] The rescript was issued in the reign of the two Emperors, Caracalla and his brother Geta.

[81] *Dig.* 47, 22, 1, 2. Members of corporations were called variously *collegae*, *sodales*, *socii:* see Dig. 47, 22, 4.

[82] See supra vol. i, § 353.

[83] See supra vol. i, § 334.

it as a provision against drunkenness — wines usually being served at the monthly meetings. Baldwin's explanation is the most rational: it was designed to prevent accumulation of wealth in the hands of a few persons.[84]

Although Roman law provided that a member of a corporation could sever his connection therewith or give room to his successor, yet it never provided for transference of the right of membership by certificates for shares of the same par value, as does modern law.[85] The nearest approximation was the publicani, or companies of tax collectors to whom the revenues of the State were farmed for collection: the publicans divided their membership into small interests called "partes" or "particulae".[86]

§ 549 **Corporate management.** All the members of every Roman corporation shared equally in the internal government of the corporation to this extent: by majority vote they could make, within legal limits, the internal organization what they desired.[87] This provision of Roman law the jurist Gaius claims to have been one of the laws of Solon.[88] Modern law grants the same power of internal management to members of a private corporation. Among the incidental rights of internal corporate management are these: to fill vacancies in membership, to elect officers, to make by-laws, to indicate who should act for the corporation in transactions with others.[89]

§ 550 **Rights and duties of a corporation: (1) ownership and possession.** The exercise of the functions for which a corporation is established, engenders rights and duties with the outside world. In both Roman and modern law, corporations generally have the same capacity to hold, acquire, or possess

[84] On the interpretation of this provision see Baldwin, *Mod. polit. inst.*, p. 150.

[85] Baldwin, *Id.* p. 153.

[86] See Smith, *Dict. of antiq.*, "publicani."

[87] *Dig.* 50, 17, 160, 1; *Nov.* 120, 6, §§ 1–2. See *Dig.* 47, 22, 4; *Dig.* 3, 4, 1, 1; *Code*, 11, 32 (31), 3; Mackeldey (Dropsie), *Roman law*[14], § 150.

[88] *Dig.* 47, 22, 4. See supra vol. i, § 24.

[89] ROMAN LAW: *Dig.* 3, 4, 1, 1; *Dig.* 50, 17, 160, 1; *Nov.* 120, 6, §§ 1–2. See *Dig.* 47, 22, 4; *Code*, 11, 32 (31), 3; Mackeldey (Dropsie), *Roman law*[14], § 150. MODERN LAW: Robinson, *American jurisprudence*, § 90; Robinson, *Element. law*[2], § 24.

property, to form obligations, to sue and be sued in courts of justice as do natural persons.

A corporation, in both Roman and modern law, can acquire property — directly through the action of the corporate body,[90] or indirectly through agents.[91] Not only is a corporation as capable of possessing property as a natural person, but it can also acquire property by prescription — that is, by adverse possession.[92] The property of a corporation belongs to the corporation itself and not to the individual members, except at dissolution.[93] Not only can a corporation hold property in its own name, but it can dispose of its property by alienation.[94]

The Emperor Marcus Aurelius gave Roman private corporations the power to alienate property by manumission.[95] Roman private corporations could acquire easements in land,[96] and also the right to enjoy the fruits of property owned by another.[97]

§ 551 (2) **Testamentary acquisition of property.** The modern right of corporations to acquire property by will is of Roman origin. In the law of Justinian corporations could take

[90] ROMAN LAW: Colquhoun, *Roman law*, § 902. MODERN LAW: Robinson, *American jurisprudence*, § 90; Robinson, *Element. law*[2], § 24.

[91] ROMAN LAW: Gaius, 2, 89–90; Savigny, *System*, vol. ii, § 91.

[92] *Dig.* 10, 4, 7, 3. See infra "prescription," § 648.

[93] *Dig.* 1, 8, 6, 1; Robinson, *Element. law*[2], § 23 (England and U. S.). See infra § 556.

[94] *Dig.* 3, 4, 1, 1; Mackeldey (Dropsie), *Roman law*[14], § 155; Robinson, *El. law*[2], § 24.

[95] *Dig.* 40, 3. See supra § 436 The same Emperor also gave to private corporations patronal rights: a manumitted slave could not testify against the corporation setting him free, any more than against a natural person setting him free; but he could testify against the individual corporate members (*Dig.* 2, 4, 10, 4).

[96] *Dig.* 8, 1, 12. An easement or servitude is a right exercisable in the land of another (for instance a right of way to arrive at the street). See infra "praedial sevitudes," § 595.

[97] *Dig.* 7, 1, 56. Corporations were ordinarily not allowed to acquire "personal servitudes," — see Colquhoun, *Roman law*, § 901. This right of use (usufructus) was, however, limited to 100 years: *Dig.* 7, 1, 56. But a corporation could lose a right of usufruct by prescription, that is, by losing possession for the requisite time: *Dig.* 7, 6, 3.

(§ 551) property by will, benefit under a trust, or even in some cases inherit ab intestato. These rights had been acquired gradually, and only by Imperial statutes. Originally in Roman law a corporation could not take property under a will: it was, as the jurist Ulpian says, an *uncertain* person.[98] But during the Early Empire legislation was enacted giving corporations, both public and private, capacity to receive property by will.

The first step was taken by empowering corporations to succeed as testamentary heirs to their freedmen.[99] The Emperor Nerva granted to municipalities the right to receive legacies, which enactment was subsequently enlarged by the Emperor Hadrian.[100] And about the same time, perhaps also in the reign of Hadrian, cities were empowered to take property coming by testamentary trusts.[101] The rights of municipalities both to receive legacies and to acquire property by testamentary trusts were confirmed during the Later Empire by the Emperor Leo.[102]

Capacity to take legacies was given to private corporations during the reign of Marcus Aurelius.[103] But a little over a century later the Emperor Diocletian restricted this right to corporations specially authorized to take property by will.[104] And such was the law also in the time of Justinian.

[98] Ulpian, *Reg.* 22, 5; 1 Poste, *Gaius*[4], p. 120; Pliny, *Epist.* 5, 7. The obstacle in the Early Imperial law was this: an uncertain heir appointed by will could not make *cretio*, or the solemn formality of an *hereditas*, required by the *jus civile*. There is a conflict of authority as to whether a succession devolving by praetorian law — *bonorum possessio* — could go to a corporation: Savigny, *System*, vol. ii, § 93, holds that the corporation could take it.

[99] Ulpian, *Reg.* 22, 5. The objection to a corporation as an *incerta persona* (unable to make *cretio*) subsequently lost its force when that formality became obsolete. As to freedmen, see supra §§ 434, 436.

[100] Ulpian, *Reg.* 24, 28.

[101] Ulpian, *Reg.* 22, 5; *Dig.* 36, 1, 27 (SC. Apronianum). As to testamentary trust or trust bequests (*fideicommissa*), see infra § 712.

[102] *Code*, 6, 24, 12 (A.D. 469).

[103] "Cum senatus temporibus divi Marcus permiserit collegiis legare": *Dig.* 34, 5, 20.

[104] "Collegium, si nullo speciali privilegio subnixum est, hereditatem apere non posse": *Code*, 6, 24, 8 (A.D. 290).

Originally in Roman law a corporation could not inherit ab intestato, for it has no ancestor. But during the Later Empire certain corporations were given the right to succeed to the property of deceased members dying without natural heirs.[105] And such favored corporations succeeded even in priority to the State.[106]

§ 552 (3) **Contracts.** In both Roman and modern law, corporations can contract with other persons.[107] As to ordinary contractual obligations there is no difference between corporations and natural persons. The individual members of a corporation are not ordinarily liable for corporate debts: the corporate property alone is liable.[108] The contracts of corporations are, in both Roman and modern law, made through corporate agents.[109]

§ 553 (4) **Torts and crimes.** A corporation as a distinct person cannot commit a tort: it is incapable of forming the necessary evil intent. But in both Roman and modern law, when agents of a corporation acting within the scope of their authority commit wrongful acts from which the corporation receives a benefit, the corporation is liable and may be sued because of the tort.[110] Therefore corporate acts of a fraudulent nature done by the officers of a corporation may be set aside by courts of justice.[111]

[105] *Code*, 6, 62 "De hereditatibus decurionum navicullariorum cohortalium militum et fabricensium." This title contains legislation of Constantine, Constantius, Theodosius, and Valentinian (A.D. 326–439).

[106] *Id.*

[107] Savigny, *System*, vol. ii, § 92; Robinson, *Element. law*[2], § 24 (England and U. S.).

[108] "Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent:" *Dig.* 3, 4, 7, 1. But Savigny (*System*, vol. ii, § 92) shows that a corporation could under certain circumstances call on its members for money, and thus compel them to pay a debt.

[109] *Dig.* 3, 4, 1, 1; Robinson, *American jurisprudence*, § 91. The Roman agent was called "actor" or "syndicus." His contracts were enforceable by an *actio utilis* against the corporation: *Dig.* 3, 4, 10. Moreover, in Roman law, a slave might act as an agent for the corporation, and his contract was enforceable by an *actio directa:* Savigny, *System*, vol. ii, § 92.

[110] *Dig.* 4, 3, 15, 1; *Dig.* 43, 16, 4; Savigny, *System*, vol. ii, § 95; Robinson, *American jurisprudence*, §90.

[111] *Dig.* 4, 3, 15, 1; *Dig.* 4, 2, 9, 1.

In both Roman and modern law a corporation as a distinct person is not generally chargeable with a crime: it cannot form the necessary criminal intent.[112]

§ 554 (5) **Lawsuits.** In both Roman and modern law a corporation, acting through its proper officer, may sue or be sued in a court of justice.[113] The officer of a Roman corporation who brought or defended actions at law was the *actor* or *syndicus*.[114] He was the representative of the corporation and not of the individual members.[115]

§ 555 **Dissolution of corporations.** In both Roman and modern law the existence of a corporation may cease as follows: (1) by death or withdrawal of all its members[116]; (2) by expiration of its franchise[117]; (3) by voluntary surrender of its franchise[118]; (4) by violation of its franchise, followed by forced dissolution of the corporation by the State.[119]

§ 556 **Survival of the Roman law of corporations in the modern world.** The jurisprudence of every modern civilized State contains the fundamental principles of the Roman law of private corporations. Their familiarity is but proof positive of their survival since Justinian to the present time. Every

[112] Colquhoun, *Roman law*, § 906; Savigny, *System*, vol. ii, § 94; Morawetz, *Private corporations*[2] (American law), vol. ii, § 732. Modern law however has made criminal certain acts of commission or of neglect of duty, which do not depend upon the intention of the offender: Morawetz, *Id.* § 733.

[113] *Dig.* 3, 4, 7; *Dig.* 3, 4, 1, 1; Morawetz, *Private corporations*[2], §§ 356–8, 779.

[114] *Dig.* 3, 4, frag. 1, § 1; frag. 2; frag. 6, § 1; frag. 10. The Roman "syndicus" has given its name to the modern French *syndic*, who is the 'trustee' of the property of an insolvent person, — see *Code of commerce*, 460, 462 et seq.

[115] *Dig.* 3, 4, 2.

[116] *Dig.* 7, 4, 21; Smith, *Dict. of antiquities*, "universitas"; Mackeldey (Dropsie), *Roman law*[14], § 155; Blackstone, *Comm.*, vol. i, p. 485. Savigny (*System*, § 89) and Colquhoun (*Roman law*, § 916) hold that a corporation is not affected by the natural death of its members, but only by their *civil* death (supra § 452).

[117] Amos, *Roman law*, p. 122; Mackenzie, *Roman law*[7], p. 162.

[118] Colquhoun, *Roman law*, § 918; Blackstone, *Comm.* vol. i, p. 485.

[119] *Dig.* 47, 22, 3, pr.; Mackeldey (Dropsie), *Id.;* Mackenzie, *Id.;* Colquhoun, *Id.* § 919; Blackstone, *Id.;* Robinson, *Element. law*[2], § 24.

system of modern corporation law is indeed modern Roman law. Really, all that modern law has done is to enlarge the superstructure and add to the details of corporation law. The Roman world was a world of great corporate activity; the modern world parallels it in the same way, but with increased intensity and breadth of corporate industry. (§ 556)

BOOK II

PROPERTY, OWNERSHIP AND ITS MODIFICATIONS

BOOK II

PROPERTY, OWNERSHIP AND ITS MODIFICATIONS[1]

Nature of the Roman law of property. The order of treatment is that of the French Civil Code. The Roman law of property is by far the most important of all the departments of Roman jurisprudence. And it has almost completely survived in modern jurisprudence. "As a code for the regulation of property," says Mozley, "the Roman law commands our admiration; its assumptions, its distinctions, its fictions are of the highest legal merit; its whole structure was based on nature and common sense, and it carried into the most intricate details and applications an instinctive standard of equity, of which it never lost sight." In its regulation of property "we have an anticipation of modern civilization, and we feel ourselves amid modern ideas and in the atmosphere of our own courts."[2] Our study of the law of property will be divided into two parts: first, the classification of property and the nature of ownership; second, the various modes of acquiring ownership. This is the order of treatment adopted in the French Civil Code and in nearly all the Modern Codes.[3] § 557

[1] This is the heading of book ii of the Italian and Spanish Civil Codes, and it differs but slightly from the headings of book ii of the French, Louisiana, Quebec, Chilean, and Mexican Civil Codes.

[2] Gibson, *Influence of Christianity on the law of Rome*, 31 Law Mag. and Rev. p. 393.

[3] The chief exceptions are those of Austria, Germany, Switzerland, and Japan.

TITLE I

THINGS (RES[4])

Conception of a thing. In both Roman and modern law, things are the *objects* of rights. This is the primary meaning of res. And these objects are usually — though not always — physical, for instance a book or a field. But there is a secondary restricted meaning of the word "thing": namely the *right in the physical object*. And this right in or to a physical object —for instance the ownership of a field or a right of way over the field — is called a *right in rem* or *real* right. § 558

CHAPTER I

DIVISIONS OF THINGS[1]

Things subject to divine law: res sacrae, res religiosae, res sanctae. The Roman law of property was intelligently philosophized in the 2d century A.D. by the jurist Gaius,[2] who indicated the fundamental differences between things, dividing them into various antithetical groups. His first and fundamental classification of things was into those subject to divine and those subject to human law. This distinction of things derived its importance from the peculiar relation existing — especially in pagan times — between the religious and the civil (secular) law of Rome. § 559

[4] This is the heading of the first title of book ii of the Louisiana and Chilean Civil Codes; it abbreviates both that of the French Code (which is "The different kinds of things") and that of the Quebec and Italian Codes (which are "The distinction of things"); and it is equivalent to that of the Spanish and Mexican Codes (which is "The classification of property").

[1] This is the heading of chapter i of title i, book ii, of the Louisiana Civil Code.

[2] See supra vol. i, § 86.

Things not subject to any ownership were described in Roman law as belonging to divine law. Instances of res divini juris[3] were temples, burial places, holy things, and certain sanctioned or forbidden things, like city gates and walls. These things were collectively described in Roman law as res sacrae, res religiosae, res sanctae. All were incapable of being objects of ownership. Sir Henry Maine declares that "some part of the Roman rules as to this class of things still affects our law of churchyards" in England.[4]

The Roman res sacrae correspond somewhat, in the law of England, to consecrated buildings or churches. But ownership of the latter is always vested in some authority, like the bishop, dean and chapter.[5] Consecrated as well as unconsecrated burial places or cemeteries exist in the United States. Both Roman and modern law treat ambassadors as inviolate or *sanctae personae*.[6]

§ 560 **Things subject to human law: (1) things excluded from private ownership (extra commercium) — res publicae, res communes.** Things subject to human law (res humani juris[7]) were those which are capable of being objects of ownership. But in Roman law there were some things over which the rights of private property could not be exercised, — namely things excluded from private ownership (res extra commercium, or res extra patrimonium[8]). Things not subject to private ownership comprised public things and common things. Public things (res publicae) are those which form part of the domain or property of the State or of municipalities — such as harbors, rivers, streets, theaters, public baths. Common things (res communes) are those the ownership of which belongs to no individual — such as the air, sea, seashore.

[3] Gaius' term.

[4] Maine, *Early law and custom*, ch. iii.

[5] In England sometimes the parson or a private person has a sort of subordinate freehold inside the building, — Williams, *Inst. of Justinian*[2], p. 56.

[6] *Dig.* 50, 7, 18 (17); Williams, *Inst. of Justinian*[2], p. 57; Phillimore, *Internat. law*, vol. ii, part vi, ch. 5–9.

[7] Gaius' term.

[8] The so-called *res inhabiles* consisted of things not prescriptible — that is, things not subject to adverse possession: see infra "prescription," § 650.

Modern law retains the Roman distinction between public and private property, as will be noticed from the following instances: "Things extra commercium are either common or public." [9] "Things which are common are those the ownership of which belongs to nobody in particular and which all men may freely use . . . such as air, running water, the sea and its shores." [10] The air, sea, seashore, rivers, harbors are, in the English Common Law, ordinarily common and available to the public.[11] "Public things are those the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation; of this kind are navigable rivers, seaports, . . . harbors, highways, and the beds of rivers." [12] "All roads, public highways, and streets kept up by the State; rivers and streams, . . . the seashore, . . . ports, havens, anchorages, and . . . all parts of French territory which are not capable of being private property are considered property of the State." [13] "The gates, ramparts, and ditches of fortified towns and fortresses also form part of the property of the State." [14] "Properties are either public or private." [15] "Things in the territory of the State are either the property of the State or private property." [16]

§ 561 **Things subject to human law: (2) things susceptible of private ownership (in commercio).** The law of private property is concerned with things made objects of ownership by positive human law. These things were described in Roman law as being in commerce (res in commercio, or res in patrimonio). Modern law is like the Roman. For instance,

[9] *Civil code* of Louisiana, 449. This provision is restated almost word for word in that of Porto Rico, 325.

[10] *Civil code of Louisiana*, 450.

[11] Williams, *Inst. of Justinian*[2], pp. 49–52.

[12] *Civil code* of Louisiana, 453. This provision is practically restated in that of Porto Rico, 326.

[13] *Civil code* of France, 538 (Wright).

[14] *Id.*, 540 (Wright).

[15] *Civil code* of Mexico, 697 (Taylor).

[16] *Civil code* of Austria, 286 (Winiwarter).

according to the Mexican Civil Code, "all things not excluded from commerce may be the object of acquisition."[17]

§562 **Corporeal and incorporeal things (res corporales and res incorporales).** This distinction of things is the fundamental one of things susceptible of ownership.[18] The Roman jurist Gaius clearly explains this classification as follows.[19] "Moreover some things are corporeal, others are incorporeal. Corporeal things are tangible, as for instance land, a slave, clothing, gold, silver, and many others. Incorporeal things are intangible, such as those which exist in contemplation of law, as for instance an inheritance, . . . an obligation." And Gaius' language is repeated verbatim four centuries later in the Institutes of Justinian.[20]

Modern law repeats this Roman classification of things. The following are instances. "Things are divided . . . into corporeal and incorporeal. Corporeal things are such as are made manifest to the senses, which we may touch or take, which have a body whether animate or inanimate. Incorporeal things are such as are not manifest to the senses, and which are conceived only by the understanding; such as the rights of inheritance servitudes and obligations."[21] "Things are divided into corporeal and incorporeal."[22] The English Common Law divides property into corporeal and incorporeal things.[23]

§563 **Immovable and movable things (res immobiles and res mobiles).** This distinction is based on the general qualities of things, and is of widest scope in both Roman and modern law. Land, and whatever is connected therewith, are immovable things.[24] Other corporeal things are movable.[25]

[17] Art. 680 (Taylor).

[18] See Holland, *Jurisprudence*[8], ch. 8, pp. 88–90.

[19] Gaius, 2, 12–14.

[20] *Inst.* 2, 2.

[21] *Civil code* of Louisiana, 460. This article is practically restated in the code of Porto Rico, 330.

[22] *Civil code* of Austria, 291 (Winiwarter).

[23] Robinson, *El. law*[1], §§ 39–40.

[24] Land: *Dig.* 43, 16, frag. 1, §§ 3, 4, 6; frag. 3, § 15; *Dig.* 7, 9, 1, 1. Trees, plants, and fruits: *Dig.* 19, 1, 40; *Dig.* 6, 1, 44. Buildings: *Dig.* 41, 1, 7, 10; *Dig.* 44, 7, 44, 1; *Dig.* 9, 2, 50.

[25] See *Dig.* 50, 16, 93.

Modern law repeats this Roman division of property into movables and immovables. Here are some instances. "All property is either movable or immovable."[26] "All property, incorporeal as well as corporeal, is movable or immovable."[27] "Things are divided into . . . movable and immovable."[28] "The third . . . division of things is into movables and immovables."[29] The English Common Law also divides corporeal things into real and personal property, — these terms "real" and "personal" correspond to the Roman "immovable" and "movable".[30]

Divisible and indivisible things. This is a Roman distinction based on the general qualities of things. Separation of things into parts usually occurs only when physically possible; but there may be a juridical division into imaginary parts, for instance where a single thing is owned in common by two or more persons. This Roman distinction of things is recognized in modern law. § 564

Consumable and non-consumable things. This is a Roman distinction based on the general qualities of things. Consumable things lose their substance or value by use; non-consumable do not. Illustrations of consumable things are wine, oil, food. This distinction as to things has descended into modern law, as will be noticed from the following illustrations. "Things are divided . . . into consumable and non-consumable."[31] "Movable property is either consumable or non-consumable."[32] "Consumable things, in the legal sense, are movable things whose ultimate use consists in being consumed or disposed of."[33] § 565

Fungible and non-fungible things. This is a Roman distinction based on the mode of designating things. In other § 566

[26] *Civil code* of France, 516. In French law, "foncier " and "mobilier" are technical terms used to denote *immovable* and *movable* property.

[27] *Civil code* of Quebec, 374.

[28] *Civil code* of Austria, 291.

[29] *Civil code* of Louisiana, 461. That of Porto Rico, 332, is similar.

[30] Robinson, *El. Law*[1], §§ 41–2; Williams, *Inst. of Justinian*[2], pp. 79–80.

[31] *Civil code* of Austria, 291.

[32] *Civil code* of Spain, 337.

[33] *Civil code* of Germany, 92 (Wang).

words, things are *generic* or *specific*.[34] If a thing was generically designated in a contract, any one of the kind might be furnished (for instance 1,000 sestertia — Roman coins); but if a thing was specifically designated, it alone could be furnished.[35] This Roman division of things is retained in modern law. For example, according to the German Civil Code, "fungible things, in the legal sense, are movable things which . . . are determined by number, weight, or measure."[36]

§ 567 **Single and collective things (res singulae or singulares and rerum universitates).** This is a Roman distinction based on the mode of designating things. Illustrations of a collective thing are a herd of cattle, a stock of goods, an inheritance. A collective thing has this peculiarity: it is taken as a whole and without any regard to the number of the individuals or elements composing it. This Roman division of things is found in modern law.

§ 568 **Principal and accessory things (res principales and res accessoriae).** This is a Roman distinction of things based on their mutual relations. It is familiarly known to modern law, and is of very great importance. A principal thing is one that exists alone, — is self-subsisting. An accessory thing is anything which belongs to or is dependent upon a principal thing. A right to the principal thing includes always the right to the accessory thing. The chief examples of accessory things are *accessions* and *fruits*.[37] Roman law divided fruits into natural, industrial, and civil. *Natural fruits* are spontaneous products of things; *industrial fruits* are products obtained by cultivation.[38] *Civil fruits* consist of revenue or income from houses or lands.[39]

[34] See *Dig.* 12, 1, 2, 1; Mackeldey (Dropsie), *Roman law*[14], § 161. See *Inst.* 3, 14, pr.

[35] *Id.*

[36] Art. 91 (Wang).

[37] *Dig.* 6, 1, 20; *Dig.* 50, 16, frag. 35, 75, 246, § 1; *Dig.* 12, 1, 31, pr. As to what constitutes an accession, see *Dig.* 18, 1, frag. 47–9, 78; *Dig.* 45, 1, 91, 4; *Dig.* 46, 3, 43; *Dig.* 46, 1, 71; *Inst.* 1, 3, 20, 5.

[38] See *Dig.* 50, 16, 77; *Dig.* 22, 1, 45; *Dig.* 41, 1, 48, pr.; *Dig.* 7, 1, 9 as to the distinction between *fructus naturales* and *industriales*.

[39] See Paulus, *Sent.*, 3, 6, §§ 27b, 27c; Dig. 22, 1, 36. Interest arising from money invested is not strictly *fructus:* it is the result of a special agreement (*Dig.* 50, 16, 121).

The Roman division of fruits has descended into modern law. For instance Spanish law defines and divides fruits as follows. "Natural fruits are the spontaneous product of the soil, and the offspring and other products of animals. Industrial fruits are those produced by lands of any kind by reason of cultivation or labor. Civil fruits are rents of buildings, proceeds from leases of lands, and the amount of perpetual, life, or other similar incomes." [40]

Rights in rem (real rights) and rights in personam (obligations) defined and distinguished. Roman law divided incorporeal things into two classes: rights in rem and in personam.[41] A right in rem — called also a real right — is either complete or limited ownership.[42] A right in rem is the fullest possible right of property, and is good against the whole world.[43] The Roman conception of ownership has survived universally in modern law. For instance, the Austrian Civil Code thus restates the vital characteristic of the Roman right in rem: "rights which belong to a person over a thing without regard to certain persons are called real rights." [44] § 569

A right in personam — called also an obligation, personal right, obligatory right, claim, or liability — is a right of control over a definite person [45] for the purpose of obtaining from him an act or an abstention from an act. The Roman conception of an obligation has descended into all modern law. For instance, the Austrian Civil Code thus describes the characteristic of a right in personam: "rights which rise direct from a law or from an obligatory act in regard to a thing only toward certain persons are called personal rights as to things."[46]

[40] *Civil code* of Spain, 354–7; Porto Rico, 363.

[41] *Dig.* 2, 14, 7, 8: "Pactorum quaedam in rem sunt, quaedam in personam. In rem sunt, quotiens generaliter . . . in personam, quotiens . . . a persona " (Ulpian).

[42] A modification or dismemberment of ownership is known in Roman law as a servitude or right in the property of another (see infra § 582). Some of these servitudes are like the Anglo-American easements.

[43] "Generaliter": *Dig.* 2, 14, 7, 8.

[44] Art. 307 (Winiwarter).

[45] "A persona": *Dig.* 2, 14, 7, 8.

[46] Art. 307 (Winiwarter).

There are certain *differences between rights in rem and in personam.* The right in rem has two attributes which are lacking to the right in personam: right of pursuit and right of preference. 1. Right of pursuit. A right in rem follows the property wherever it goes; it is good against the world, and not merely against a determinate individual. But a right in personam is good only against the debtor or person liable to perform the obligation in question. 2. Right of preference. A right in rem confers upon its holder the right to exclude not only those holding merely a right in personam, but also those holding a right in rem later in date.[47] Such right of preference is entirely lacking to the holder of a right in personam.

§570 **The Republican and Early Imperial division of things into res mancipi and res nec mancipi (not found in the law of Justinian).** This is a distinction of things based on their mode of alienation. If property was conveyed by the ancient formal process of *mancipatio*[48] or conveyance by money and the balance[49] (per aes et libram), such things were called res

[47] "He who is first in time is first in right" is both the Roman and the Anglo-American maxim governing the position of several holders of rights in rem: see *Code*, 8, 17, 3; in *Sext.*, lib. v, tit. 12 *De regulis uris* (Boniface VIII), 54; 4 Coke, 90a.

[48] "Mancipatio is a fictitious sale . . . which right is peculiar to Roman citizens, and is thus accomplished: in the presence of not less than five witnesses, Roman citizens over the age of puberty, and another . . . who holds a bronze balance and is called the *libripens*, he who receives the thing by mancipation, holding a piece of copper money (aes) says the following words: 'I declare that this slave is mine *ex jure Quiritium*, and that I have purchased him by this money and this bronze balance'; and thereupon he strikes the balance with the coin, which he delivers, as if the purchase price, to him receiving the thing by mancipation." (Gaius, 1, 119). The function of the libripens reveals the antiquity of mancipatio: he weighed out the copper ingots of money (aes), which constituted payment of the purchase price. Now there was no coined Roman money prior to the Law of the XII Tables (449 B. C.). After money began to be coined (the silver *denarius* was introduced 269 B. C.), the weighing still continued. But the XII Tables provided that the symbolical payment in mancipatio must always be supplemented by actual payment of the price agreed upon: see *Inst.* 2, 1, 41; Sohm (Ledlie[3]), *Roman law*, p. 49.

[49] Hunter's expression "conveyance made with the money and the scales" (*Roman law*[4], p. 19, Table vi, 1), while very clear, lacks somewhat in conciseness.

mancipi. Now *mancipium* was the ancient Roman ownership, exercisable over Roman things (res mancipi) for the benefit of Roman citizens only.[50] In the category of res mancipi were slaves, animals used as beasts of burden, Italian land and servitudes (easements) therein.[51] All other things were res nec mancipi.[52]

This centuries-old division of things, which originated in Ancient Roman law and persisted down into the Early Empire, fell into disuse after the bestowal of Roman citizenship on all free inhabitants of the Empire by Carcalla in A.D. 212.[53] It is not mentioned at all in the law of Justinian, and it has not descended into modern law.

Classification of property. Property, in both Roman and modern law, is composed of three groups of incorporeal rights: ownership, rights in the property of another,[54] and obligations. Or, still more summarily, property-rights consist of ownership, complete or limited, and obligations. § 571

[50] Girard, *Manuel de droit romain* [5], p. 263.
[51] Gaius, 1, 120–21; Ulpian, *Reg.* 19, 1.
[52] Ulpian, *Reg.* 19, 1.
[53] See supra § 443.
[54] For instance, a servitude or easement (infra § 582).

TITLE II

OWNERSHIP[55]

CHAPTER I

EVOLUTION AND SCOPE OF OWNERSHIP

Ownership (dominium or proprietas) defined. Ownership is the most absolute right of property known to both Roman and modern law, and it is available against all the world. Only the State or law-making power is superior to it.[1] Ownership is the complete power exercised by a person over a corporeal thing.[2] It is the unrestricted right of using, enjoying, and disposing of a thing. These are the elements of ownership.[3] §572

Modern law but repeats the Roman law conception of ownership. For instance, according to the French Civil Code, "ownership is the right of enjoying and disposing of things in the most absolute manner."[4] The German Code provides that "the owner of a thing may control it as he wishes without interference on the part of any third person."[5] The Spanish and Porto Rican codes define ownership to be "the

[55] This is the heading of the second title of book ii of the French, Italian, Spanish, Louisiana, Quebec, Chilean, and Mexican Civil Codes.

[1] **Eminent domain** or "forced sale" of property was recognized in Roman law: Tacitus, *Annals*, book i, § 75: Frontinus, *De aquis urbis Romae*, book ii, § 128 (Herschel, transl. p. 91); *Dig.* 21, 2, 11. See also *Dig.* 8, 6, 14, 1; *Code*, 8, 11, 14; McNulty, *Eminent domain in Continental Europe*, 21 Yale Law Journal, 555; Williams, *Inst. of Justinian*[2], p. 206.

[2] See *Inst.* 2, 4, 4. It includes everything above and below the soil: Mackenzie, *Roman law*[7], p. 170.

[3] These elements of ownership are described in *Inst.* 2, 4, pr., and *Dig.* 7, 1, 1. When all are present, the ownership is complete (*dominium plenum*); but where the owner has merely the bare legal title and no rights of use and enjoyment, this ownership is restricted (*dominium minus plenum, nuda proprietas*).

[4] Art. 544.

[5] Art. 903.

right to enjoy and dispose of a thing."[6] The Japanese Code is in line with Roman law: "the owner has the right . . . freely to use the thing, to take the profits of it, and to dispose of it."[7] Anglo-American law is also like the Roman: Blackstone defines property (he means ownership) to "consist in the free use, enjoyment, and disposal of all . . . acquisitions without any control or domination."[8]

§ 573 **In the law of Justinian there was but one kind of ownership. But in the ante-Justinian law there were two forms of ownership: quiritary and bonitary.** In the Justinian law there was but one kind of ownership. It was devoid of any solemnity of form. It was uniform throughout the Roman State. It was effective over all property susceptible of ownership.[9] And such are also the modern law attributes of ownership.

But in the Roman law of the Republic and Early Empire there were two forms of ownership: quiritary and bonitary. Quiritary ownership (*dominium ex jure Quiritium*) was the full ownership exercisable by *citizens* only. It was provided by the law for citizens (jus civile[10]), especially the Law of the XII Tables. quiritary ownership was exercisable over things transferable by that formal conveyance by money and the balance known as mancipatio.[11] Quiritary ownership was confined largely to property located in Italy.[12]

Bonitary[13] ownership (*in bonis habere*[14]) was originally an inferior kind of ownership[15] provided by the praetor in

[6] *Civil code* of Spain 348; Porto Rico, 354.

[7] Art. 206 (Lönholm).

[8] *Commentaries*, vol. i, p. 138.

[9] See supra §§ 561, 560.

[10] See supra vol. i, §§ 33, 40.

[11] *XII Tables*, vi, 1; supra § 570.

[12] Gaius, 1, 120.

[13] The word "bonitary" is derived from Theophilus' description in his Institutes (1, 5, § 4) of the holder of a jus gentium ownership: "δεσπότης βονιτάριος."

[14] See *Dig.* 41, 1, 52.

[15] See Gaius, 2, 40–1. But nevertheless it was ownership, and it came to be called *dominium* in contradistinction to the *dominium ex jure Quiritium*. Girard, *Manuel de droit romain*[6], p. 262. Hence it was sometimes called 'natural' ownership as opposed to 'civil' ownership.

accordance with the principles of the jus gentium.[16] Bonitary ownership was exercisable by *foreigners and non-citizens*, that vast body of persons in the Roman Republic and Early Empire known as *peregrini*.[17] Anything not yet acquired in quiritary ownership, or things which could never be acquired in quiritary ownership,[18] could be held in bonitary ownership. Its scope was far wider and more equitable than that of quiritary ownership. Although a right originally less complete than dominium ex jure Quiritium, ownership in bonis was finally covered by praetorian Roman law with an adequate protection; and the distinction between the two forms of ownership became one more of words than of reality.

This dual ownership — one for the citizen and one for the non-citizen or subject — continued in vogue until the Edict of Caracalla[19] in A.D. 212, which extended full citizenship to all free inhabitants of the Empire wherever residing. This extension of citizenship was soon followed by the disappearance of quiritary ownership as a distinct form of ownership. Quiritary ownership became completely amalgamated and swallowed up in the more equitable bonitary ownership of the praetors. And some three centuries later Justinian[20] formally abolished this ancient name itself, then but an enigma and a bugbear to law students of the 6th century.

Acquisition and extinction of ownership. In both Roman and modern law, ownership is acquired in seven ways: by occupancy, accession, delivery, adjudication, gift, prescription, and succession. These modes will subsequently be considered separately.[21] Ownership is extinguished in two ways: by the destruction of the thing itself, and by its abandonment. § 574

Extinction of ownership by abandonment needs some explanation. In Roman law a thing was held to be abandoned

[16] See supra vol. i, §§ 44, 65.

[17] *Id.* See supra § 442.

[18] That is, not conveyable by mancipatio (explained supra § 570).

[19] See supra § 443.

[20] *Code*, 7, 25; *Code*, 7, 31.

[21] See infra book III "The different modes of acquiring ownership," §§ 625 et seq.; § 661 (universal succession, — the chief example of which is inheritance).

(§574) (res derelicta) only when it was thrown away with the deliberate intention that it shall no longer be part of one's property.[22] Consequently property jettisoned from a ship during a storm to save the ship and passengers is not abandoned: the intent is to save the ship and lives of all, and not to cast away the ownership of the property thrown overboard.[23] Roman law punished as a thief any person who picked up jettisoned property. The Louisiana Code illustrates as follows the survival of this principle in modern law: "We must not reckon in the number of things abandoned those . . . lost or . . . thrown into the sea in peril of shipwreck . . . or lost in a shipwreck. For although the owners of such things lose possession of them, yet they retain the ownership and the right to recover them. Therefore those who find things of this kind . . . are obliged to restore them to their lawful owners."[24] Modern law is equally as severe as the Roman in regard to appropriating shipwrecked property: for instance, persons stealing goods thrown out of a ship are guilty of a felony by the law of England.[25]

[22] *Inst.* 2, 1, 47.
[23] *Inst.* 2, 1, 48. See infra "jettison and general average," § 812.
[24] *Civil code*, 3424.
[25] 24 and 25 Vict., c. 96, § 64.

CHAPTER II

POSSESSION (POSSESSIO) AND ITS RELATION TO OWNERSHIP

Possession defined. The right to possess a thing is a legal consequence of ownership. But although ownership includes possession, yet cases occur where the possessor is not the owner — where possession is independent of ownership. And the Roman law sharply differentiated possession and ownership.[1] Possession is not ownership: it is but the externality of ownership, as Ihering so happily describes it.[2] The possessor of a thing may or may not be the owner thereof. § 575

In modern law, possession is also treated either as a right incidental to or separate from ownership. For instance, according to the Louisiana Code, "possession is the detention or enjoyment of a thing which we hold or exercise by ourselves or by another who keeps or exercises it in our name . . . Although the possession be naturally linked with the ownership, yet they may subsist separately from each other; for it may happen that the actual possessor is not the true owner."[3]

The two kinds of possession: (1) detention. In Roman law there were two kinds of possession: detention and possession leading to prescription. Possession, in its fundamental sense, is a *fact;* it is the physical control which a person exercises over a thing.[4] The basic notion of § 576

[1] "Nihil commune habet proprietas cum possessione" (*Dig.* 41, 2, 12, 1); "Nec possessio et proprietas misceri debent" (*Dig.* 41, 2, 52,); see also *Dig.* 41, 2, 17, 1.

[2] Girard, *Manuel de droit romain*[5], p. 270, p. 266, note 1, gives a thorough discussion of Ihering's doctrine. See also supra vol. i, § 352.

[3] *Civil Code*, 3426, 3435. The first article is like 2228 of the French Civil Code.

[4] *Dig.* 41, 2, 1, pr. For instance, A loans to B a book; the book during the loan is subject to B's power of possession. But in this instance there exists only the physical fact (*corpus*), or external element of possession. There is present no intention (*animus*) to hold it as owner. What the holder of the book does is to possess the thing *for* the true owner as his representative or assistant. See infra § 579.

possession is detention. Another expression in Roman law for detention was natural possession (*possessio naturalis*[5]).

Detention, as a form of possession, has survived in modern law. For instance, according to the Louisiana Code, "natural possession is that by which a man detains a thing corporeally, as by occupying a house, cultivating ground, or retaining a movable in possession."[6] Spanish law is similar: "natural possession is the holding of a thing or the enjoyment of a right by some person."[7]

§577 (2) **Possession leading to prescription.** There was in Roman law another very important form of possession — namely, possession of a thing *as if the owner* thereof. In a great many cases of possession the owner and the possessor are the same party. But in many cases they are different parties. Where a possessor — not the owner — thus holds as owner, his possession is adverse, or leading to prescription. Possession leading to prescription is also variously described as "legal possession",[8] "juridical possession",[9] "juristic possession",[10] "civil possession",[11] and "adverse possession".[12]

Modern law, like the Roman law, recognizes this kind of possession leading to prescription. For instance, Spanish law declares that "civil possession is the . . . holding or enjoyment joined to the intent of having the thing or right as his own."[13] And, according to German law, "a person who possesses a thing as belonging to him is a proprietary possessor."[14]

§578 **Origin of adverse possession, or possession leading to prescription.** In Early Imperial Roman law, possession as

[5] See Savigny, *Recht des Besitzes*[6], §§ 1, 7 (especially iv); *Id.*, translated by Perry (*Jus possessionis of the Civil Law*), pp. 1, 38, 61; Girard, *Manuel de droit romain*[5], p. 267.

[6] *Civil code*, 3428.

[7] *Civil code* of Spain, 430; Porto Rico, 433.

[8] Mackeldey (Dropsie), *Roman law*[14], § 239.

[9] Morey, *Roman law*, p. 286.

[10] Sohm (Ledlie[3]), *Roman law*, p. 330.

[11] *Civil code* of Louisiana, 3431: Spain 430.

[12] Hunter, *Roman law*[4], p. 362.

[13] *Civil code* of Spain, 430 (Walton); Porto Rico, 433.

[14] *Civil code* of Germany, 872 (Wang).

if owner was technically known as interdict possession (*possessio ad interdicta*). Originally, prior to the Edict of Caracalla in A.D. 212, only a Roman citizen could enjoy the purely Roman right of ownership (*dominium ex jure Quiritium*[15]). But justice and equity demanded that bona fide possessors who were not citizens should be secured by legal protection: therefore the praetors granted them special summary actions known as interdicts. Now by means of these interdicts the praetor professed to give *possession* and not ownership, so careful was he to respect the name "dominium". Nevertheless the result was that the non-citizen enjoyed ownership in all its substance but without the name.

After Caracalla's Edict there were no more Roman peregrini or subjects not citizens; all became citizens. Consequently interdict possession ceased to have special importance except for one thing: its requisites were applied as the standard to which all adverse possession leading to prescription must attain. And these requisites of prescriptive possession passed into the Roman law of Justinian's time, and thence into all modern law.[16]

Elements of possession leading to prescription. Adverse possession in Roman law had two elements: the physical fact of detention (*corpus*), and the intent to be owner (*animus*).[17] It necessarily involved the holding of a thing with an intention not only to exclude all other persons from it, but also to hold the thing as owner.[18] § 579

Modern law is like the Roman. For instance, according to the Louisiana Code, "to be able to acquire possession of property, two distinct things are requisite: 1. The intention of possessing as an owner. 2. The corporeal possession of the thing."[19]

[15] See supra §§ 573, 570, 443.

[16] See infra "prescription," §§ 645 et seq.

[17] "Nulla possessio adquiri nisi animo et corpore potest" (*Dig.* 50, 17, 153).

[18] "Eo nomine nanciscitur possessionem, ut credat se domium esse" (*Dig.* 6, 2, 13, 1); "animo dominantis" (Theophilus, *Inst.* 2, 9, 4 — Ferrini's Latin translation). See also *Dig.* 9, 4, 22, 1; *Dig.* 41, 3, 4, 2; *Dig.* 41, 2, 1, 20; Savigny, *Recht des Besitzes* [6], §§ 14–23; Perry, *Possession* (transl. of Savigny), pp. 142–89.

[19] *Civil code*, 3436.

§ 580 **Loss of possession.** If both elements of possession — the detention and the intent to hold as owner — disappear, there is no doubt that possession is lost. But if one of the two elements of possession is wanting, the other would, in Roman law, be inferred ordinarily. Hence possession might be retained by detention alone (*corpore tantum*) or by intent alone (*animo tantum*).[20] To be able to retain possession by possessory intent alone is a very important attribute of the right of possession.

An illustration of the rule that the owner retains possession *animo tantum* is seen in the relation of landlord and tenant. Inasmuch as the tenant holds possession for his landlord, a tenant could not during his tenancy change the character of that possession by starting adverse possession against his landlord.[21] Such adverse possession would be dishonestly constituted: for the landlord retains possession *animo tantum* through his tenant. "No one can change the character of his possession," [22] is the Roman law maxim. But if the tenant left his possession, and then later re-entered claiming to be the owner, this rule did not apply; and the former tenant could inaugurate adverse possession.[23]

These Roman rules as to the retention and change of possession have survived in modern law, as will be seen from the following illustrations. According to the Louisiana Code, "those who possess, not for themselves but in the name of another, as farmers, depositaries, and others who acknowledge an owner, cannot acquire the legal possession, because, at the commencement of their possession, they had not the intention of possession for themselves, but for another[24] . . . When a person has once acquired possession of a thing by the corporal detention of it, the intention which he has of possessing suffices to preserve the possession in him, although he may

[20] "Ut igitur nulla possessio adquiri nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contraria actum est" (*Dig.* 50, 17, 153); *Dig.* 41, 2, fragm. 27, 45, 46. See Savigny, *Recht des Besitzes* [6], §§ 33–4; Perry (*Possession* — transl. of Savigny), pp. 253–72.

[21] *Dig.* 41, 5, 2, 1; Hunter, *Roman law* [4], p. 362.

[22] *Dig.* 41, 2, 19; *Dig.* 41, 5, 2, 1. See Hunter, *Roman law* [4], p. 362.

[23] *Dig.* 41, 2, 19, 1.

[24] *Civil code*, 3441.

have ceased to have the thing in actual custody, either himself or by others.[25] . . . Even if a person who commenced his possession of an estate for another should entertain the intention of no longer holding for that other, but for himself, yet shall he still be presumed to hold possession for whom he originally took it."[26] According to Spanish law, "it is presumed that the enjoyment of the possession is continued under the same understanding with which it was acquired, until the contrary is proven."[27] According to Austrian law, "the holder, who detains a thing not in his own name but in the name of another, has still no legal ground to take possession of this thing."[28]

Why the law protects adverse possession. The reason for possessory protection has given rise to much controversy. Why does the State, acting through its courts, afford protection by appropriate actions to possession leading to prescription? There are two celebrated doctrines on this point. § 581

According to Savigny, the law protects possession because public peace demands such protection.[29] In other words, *public peace and order* require that actual possessors be maintained, unless the real owner arrives in season to reclaim his property.

According to Ihering, the law protects possession because the possessor appears to be owner.[30] This fact is generally true, as is universally known. Hence to protect the *appearance of ownership* is really to protect actual ownership. Both Savigny and Ihering are right. The best answer to why the law protects adverse possession is to unite their views.

[25] *Id.* 3442.

[26] *Id.* 3446.

[27] *Civil code* of Spain, 436 (Walton); Porto Rico, 438.

[28] *Civil code*, 318 (Winiwarter).

[29] Savigny, *Recht des Bestizes* [6], §§ 6, 36 et seq; Perry, *Possession* (transl. of Savigny), p. 27. See Hunter, *Roman law* [4], p. 389; Girard, *Manuel de droit romain* [5], p. 269, and note 2; supra vol. i, § 346.

[30] *Besitz*, in *Handwörterbuch der Staatswissenschaften* (1891). Ihering's views are discussed at length by Girard, *Droit romain* [5], pp. 166–267, 269–70. See supra vol. i, § 352.

TITLE III

MODIFICATIONS OF OWNERSHIP[1]

Nature of rights in the property of another (jura in re aliena). The three classes of Roman modifications of ownership. In both Roman and modern law the elements of ownership are: right of user, right of enjoyment, and right of disposition.[2] If one element be detached (for instance the right of user), the ownership becomes separated and dismembered — that is, curtailed or modified.[3] These detachments made from complete ownership, without destroying the superior right of the owner, consist of rights which one person exercises in the property of another; most of these were, very appropriately, called *servitudes* in Roman law.[4] § 582

Rights in another's property[5] have four general features: they are rights in rem,[6] they are always less than complete ownership, they are always subordinate to the ownership, and their existence must always be proved — it is never presumed. Jura in re aliena were divisible in Roman law into three groups: personal, praedial, and praetorian servitudes.

[1] This is the heading of the third title of book ii of the Italian Civil Code.
[2] *Inst.* 2, 4, pr.; *Dig.* 7, 1, 1.
[3] See supra § 572, note on *dominium minus plenum.*
[4] See for instance *Dig.* 8, 1, "De servitutibus."
[5] Sometimes called simply *jura in re.*
[6] See supra § 569.

CHAPTER I

PERSONAL SERVITUDES[1]

§ 583 **Nature and kinds of personal servitudes.** In Roman law personal servitudes were created and attached for the benefit of some *person*, and not for the benefit of an adjoining piece of land. In other words, persons — and not land — were the beneficiaries. Personal servitudes were a product of the ancient Roman law for citizens (jus civile).[2]

There were in Roman law four personal servitudes: usufruct, use, habitation, and servitudes. All these, except services, have descended — frequently under their Roman names — into all systems of modern Continental European and allied systems of law. And the Anglo-American "estates not of inheritance" or "estates for life" are somewhat like the Roman personal servitudes, so far as these concern immovable or real property. Bracton, the earliest authority on the English Common Law, uses the terms usufructus, usus, and habitatio in their general significance: but these do not correspond to any technical terminology of the English law of real property.

§ 584 **Modes of creating personal servitudes.** In the Roman law of Justinian there were five ways of creating personal servitudes: by contract[3]; by will[4]; by judicial decree or adjudication[5]; by prescription[6]; and by special law — for instance, Justinian gave a father a life-interest (usufruct) in property of a son in power derived from persons other than the father.[7]

[1] This term is used in the Italian edition of the Austrian Civil Code, art. 478: "Le servitù personali."

[2] See supra vol. i, §§ 40, 44.

[3] *Inst.* 2, 4, 1; *Dig.* 7, 1, 3, pr.

[4] *Id.*

[5] *Dig.* 7, 1, 6, 1; *Dig.* 10, 2, 16, 1.

[6] *Code*, 7, 33, 12, 4.

[7] The "bona adventicia," — see supra § 512.

In the Republican and Early Imperial law there were two special modes of creating personal servitudes, neither of which existed in the time of Justinian: by reservation made in a *mancipatio* — the ancient formal conveyance by money and the balance[8]; and by *in jure cessio* — a kind of fictitious lawsuit.[9]

Modes of extinguishing personal servitudes. In the Roman law of Justinian there were six ways of terminating personal servitudes. 1. By death of the holder of a personal servitude.[10] Spanish law is like the Roman.[11] In Anglo-American law an estate for life is likewise terminated by death of the life-tenant, and also by forfeiture.[12] 2. By limitation, if granted for a specified period.[13] Spanish law is similar to the Roman.[14] § 585

3. By merger, when the holder of the servitude and the naked owner become one and the same person — in other words, when there is a consolidation of different interests.[15] Spanish law is like the Roman.[16] Sir Fitzjames Stephen thus states our English Common Law doctrine as to merger: "it is a general principle of law, that where a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater";[17] consequently an estate for life is merged with the reversionary interest, if the two be consolidated in the person of the life-tenant.

4. By renunciation, or volunatry surrender, of the right of servitude to the owner.[18] Spanish law is the same as the

[8] Gaius, 2, 33; Gaius, 1, 119–22. See supra §§ 570, 573.

[9] Gaius, 2, 30 and 24.

[10] Paulus, *Sent.* 3, 6, §§ 33, 28–9. Roman law included also civil death (explained supra § 452).

[11] *Civil code* of Spain, 513; Porto Rico, 512.

[12] Williams, *Inst. of Justinian*[2], p. 90.

[13] Paulus, *Sent.* 3, 6, § 33.

[14] *Civil code* of Spain, 513; Porto Rico, 512.

[15] Paulus, *Sent.* 3, 6, § 28; *Inst.* 2, 4, 3.

[16] *Civil code* of Spain, 513; Porto Rico, 512.

[17] *Commentaries*, vol. i, book ii, part i, ch. 7.

[18] *Inst.* 2, 4, 3; *Dig.* 7, 1, 64–5; see also Gaius, 2, 29–30; Paulus, *Sent.* 3, 6, 30.

Roman.[19] In Anglo-American law, surrender or release by the life-tenant to the person entitled to the reversion terminates an estate for life.[20]

5. By non-user for the period of prescription.[21] Modern law is the same: for instance, Spanish law.[22] 6. By destruction of the property subject to a servitude.[23] And this is also a rule of Spanish law.[24] In Anglo-American law there are but few cases where the destruction of the property subject to the life estate does not terminate the life-tenant's interest.[25]

1. USUFRUCT (USUFRUCTUS)

§ 586 **Usufruct defined.** The Institutes of Justinian, borrowing from the jurist Paulus,[26] define usufruct as the right of using another's property and of taking its fruits, without impairing its substance.[27] The property in usufruct might be movable or immovable.[28] A usufruct might be created for the usufructuary's life, or to continue during the life of another, or for a term of years.

This Roman conception of usufruct has descended into modern law: "usufruct is the right to enjoy a thing owned by another person and to receive all the products, utilities, and advantages produced thereby, under the obligation of preserving its form and substance, unless the deed constituting such usufruct or the law otherwise decree."[29]

[19] *Civil code of Spain*, 513; Porto Rico, 512.

[20] Williams, *Inst. of Justinian*[2], p. 90.

[21] Paulus, *Sent.* 3, 6, §§ 28, 30. In the law of Justinian the non-user must be for 10 or 20 years — the latter period when both parties did not reside in the same province: *Code*, 3, 34, 13; Mackeldey (Dropsie), *Roman law*[14], § 323 (6).

[22] *Civil code* of Spain, 513; Porto Rico, 512.

[23] *Inst.* 2, 4, 1, and 3; Paulus, *Sent.* 3, 6, §§ 28, 31. See also infra § 597, note. There was also in Republican and Early Imperial (but not in the Justinian) law another mode of extinguishing a personal servitude — namely by *in jure cessio*: Paulus, *Id.*

[24] *Civil code* of Spain, 513; Porto Rico, 512.

[25] *Taylor* v. *Caldwell*, 3 B. and S. 826; Williams, *Inst. of Justinian*[2], p. 90.

[26] *Dig.* 7, 1, 1.

[27] *Inst.* 2, 4; *Inst.* 2, 1, 37; *Dig.* 7, 1, 9, 7.

[28] *Inst.* 2, 4, 2.

[29] *Civil code* of Porto Rico, 469; Spain, 467.

Although the conception of the Anglo-American "estate" was foreign to Roman law, yet both our "estate for life" and our "tenancy for years" or "lease" somewhat resembles the Roman usufruct. Consequently to translate usufructuary as "life-tenant" or "lessee" is apt, although not strictly accurate.

The quasi usufruct of Imperial Roman law. The general rule of Roman law was that anything movable or immovable, not consumed by use, is susceptible of usufruct. But by legislation of the Senate, enacted during the reign of Augustus or of Tiberius, things fungible,[30] particularly money, were made susceptible of quasi usufruct.[31] The holder of a quasi usufruct, upon its expiration, had to restore a like quantity of the same nature or value; if he did not, his sureties previously given for such restoration were liable. § 587

A quasi usufruct of money and other things consumable by use is recognized in modern law, for instance Spanish law.[32] In Anglo-American law it is impossible to make a life-estate or less in things which are consumed by use: the first taker has the absolute property. But it is possible to create a life-interest in a fund, though not in the actual coin, which interest can be assigned.[33]

Alienation of a usufruct. Originally in Roman law a usufruct was probably not alienable; but in course of time the usufructuary obtained the right to grant to another for compensation or gratuitously the exercise of his enjoyment[34] — the grantee using it on account of the usufructuary.[35] And there are texts of Roman law, including a statute of the Emperor Diocletian, which state very clearly that a usufruct could be leased or sold.[36] § 588

[30] See supra § 566.

[31] *Inst.* 2, 4, 2; *Dig.* 7, 5, 1; Girard, *Manuel de droit romain*[5], p. 364; Hunter, *Roman law*[4], p. 297. A quasi usufruct in such things was impossible in Cicero's time: *Topica*, 3, 15.

[32] *Civil code* of Spain, 475, 482; Porto Rico, 475, 482.

[33] Williams, *Inst of Justinian*,[2] p. 90.

[34] *Dig.* 7, 1, 12, 2; *Dig.* 7, 1, frag. 38, 39, 67; Hunter, *Roman law*[4], pp. 401–2.

[35] *Dig.* 7, 1, 38; Hunter, *Id.*

[36] *Vatican Frag.* 41 (Diocletian); *Dig.* 7, 1, 12, 2. Even against the will of the naked owner who created the usufruct: *Dig.* 7, 1, 67.

The law of some modern countries is like the Roman: for instance Spain and Porto Rico, the law of which provides that "the usufructuary may personally benefit by the property in usufruct, lease it to another person, and alienate his right to the usufruct, even though it be by deed of gift; but all contracts he may enter into as such usufructuary shall terminate at the end of the usufruct. . . . A usufructuary who alienates or leases his right of usufruct shall be liable for any damages suffered by the property in usufruct through the fault or neglect of the person who substitutes him."[37]

§ 589 **Rights of the usufructuary.** Not only was the usufructuary entitled in Roman law to the fruits of the property in usufruct,[38] but he could grant to another the exercise or benefit of his usufruct.[39] Fruits ungathered at the commencement of the usufruct, or produced during its continuance, belonged to the usufructuary.[40] But he did not become owner of the fruits until he or his agents had gathered them[41]; hence, whatever fruits remained ungathered at the terminaton of his usufruct descended to the owner of the property in usufruct and not to the heirs of the usufructuary.[42] And such is also the rule in modern law, for instance the French and Spanish.[43]

But in Roman law if the usufructuary died before the termination of his usufruct, the civil fruits (except rents of rural property[44]) were shared between the usufructuary's heirs and the naked owner — the usufructuary's heirs receiving an amount proportional to the duration of the usufruct.[45] And the same rule, but without the Roman exception, is found in modern law — for instance the French and Spanish.[46]

[37] *Civil code* of Porto Rico, 480, 497; Spain, 480, 498.

[38] *Inst.* 2, 1, 37; *Dig.* 7, 1, frag. 9, § 7; frag. 10, 11, 12, pr; frag. 18, 59, § 1. See supra § 568 as to the Roman classification of fruits into *natural*, *industrial*, and *civil*.

[39] See supra § 588.

[40] *Dig.* 7, 1, 27, pr.; *Dig.* 7, 1, 59, 1; *Dig.* 22, 1, 25, 1.

[41] "Fructus non fiunt fructuarii, nisi ab eo percipiantur": *Dig.* 7, 1, 12, 5.

[42] *Inst.* 2, 1, 36; *Dig.* 7, 4, 13; *Dig.* 7, 1, 12, 5; *Dig.* 22, 1, 25, 1; *Dig.* 33, 1, 8.

[43] *Civil code* of France, 582, 585; Spain, 471–2; Porto Rico, 471–2.

[44] *Dig.* 7, 1, 58, pr.

[45] *Dig.* 7, 1, 26.

[46] *Civil code of* France, 586; Spain, 474; Porto Rico, 474.

The products of mines and quarries belonged, in Roman law, to the usufructuary only in so far as the mines and quarries were being worked at the commencement of the usufruct.[47] Modern law is like the Roman: for instance, in Spanish law the usufructuary may work mines already opened when his usufruct began[48]; in English law, ordinarily a life-tenant cannot open mines.[49]

Obligations of the usufructuary. In Roman law the principal duties of the usufructuary were as follows: 1. He must pay the taxes and assessments on the property held in usufruct.[50] The rule is the same in modern law, for instance the Spanish.[51] §590

2. He must use the property as a careful man[52]; in other words, he must not commit waste, but must keep the property in good condition, until the expiration of the usufruct, by making proper replacements and ordinary repairs.[53] And sureties were generally exacted of the usufructuary for his faithful performance of these duties.[54] Modern law repeats the Roman as to these duties of the usufructuary. For instance Spanish law provides that the usufructuary is answerable for waste, must make replacements to keep the property as it was when he received it, and must make ordinary repairs.[55] And in Anglo-American law, a life-tenant is answerable for waste.[56]

Obligations of the owner, or the holder of the bare legal title. The naked owner must suffer the exercise of the usufruct without doing anything to prejudice the rights of the §591

[47] *Dig.* 7, 1, 9, 2; *Dig.* 7, 1, 13, 5.

[48] *Civil code* of Spain, 476–7; Porto Rico, 476.

[49] *Campbell* v. *Wardlaw*, 8 App. Cases, 644.

[50] *Dig.* 7, 1, 52; *Dig.* 33, 2, 28; *Dig.* 7, 1, 27, 2–3; *Dig.* 50, 17, 10; *Dig.* 7, 1, 7, 2.

[51] *Civil code* of Spain, 504.

[52] As a prudent paterfamilias (*Inst.* 2, 1, 38), or in a manner satisfactory to the judgment of a good man (*Dig.* 7, 9, 1, 3). See also *Dig.* 7, 9, 2; *Dig.* 7, 1, 65, pr.; *Dig.* 7, 1, 15, 2; *Dig.* 7, 1, 45. But he was not liable for ordinary wear and tear: *Dig.* 7, 9, 9, 3.

[53] *Inst.* 2, 1, 38; *Dig.* 7, 1, 64; *Dig.* 7, 1, 7, 2; *Code*, 3, 33, 7.

[54] *Dig.* 7, 1, 13, pr.; *Dig.* 7, 9, 7. pr.

[55] *Civil code* of Spain, 497, 483, 485, 499, 500.

[56] Williams, *Inst. of Justinian*[2], p. 89.

usufructuary.[57] As long as the usufruct lasted, the rights of the holder of the bare legal title were virtually in abeyance. Modern law is like the Roman, for instance Spanish law.[58]

2. USE (USUS), HABITATION (HABITATIO), AND SERVICES (OPERAE)

§ 592 **Use defined.** Although use resembled usufruct, it was greatly inferior to it. The holder of a use had only the personal right of bare user and no right of enjoyment[59]; and he could not lease or sell his right of bare user — a usus was absolutely inalienable.[60]

All these Roman features of a use — the bare right of user, which is not alienable — have descended into modern law, for instance that of France, Louisiana, and Spain.[61] That the Roman usus is the origin of the English "use" is disputed[62]; but the weight of the evidence now inclines towards Maitland's view denying a Roman origin.

§ 593 **Habitation defined.** Habitation consisted in the right of dwelling in another's house, and it differed but slightly from the right of using a house.[63] Although originally a habitation was limited in duration to a year, it was subsequently held to continue for life.[64] And Justinian made it lawful for the holder of a habitation to lease his right to another[65]; in this respect habitation came to resemble usufruct.[66]

[57] See *Dig.* 7, 1, 15, 6; *Dig.* 7, 1, 7, 1; *Dig.* 7, 1, 15, 7; *Dig.* 7, 1, 16; *Dig.* 7, 1, 17, pr.; Hunter, *Roman law*[4], pp. 403–4.

[58] *Civil code* of Spain, 489, 503.

[59] *Inst.* 2, 5, 1–3. The Louisiana Civil Code (art. 626) translates *usus* as "use". See supra § 586 as to usufruct.

[60] *Inst.* 2, 5, 1–3.

[61] *Civil code of France*, 630, 631; Louisiana, 626; Spain, 524, 525; Porto Rico, 522, 527.

[62] Williams, *Inst. of Justinian*[2], p. 91 holds in favor of a Roman origin; Maitland, *Collected papers*, vol. ii, pp. 403–16, denies a Roman origin, and holds that the "use" originated in the medieval conveyancing phrase "ad opus."

[63] *Dig.* 7, 8, 10, pr. "Habitation" is the Louisiana Civil Code (art. 627) translation of *habitatio*. See supra § 592 as to *usus*.

[64] *Dig.* 7, 8, 10, 3.

[65] *Inst.* 2, 5, 5; *Code*, 3, 33, 13

[66] See supra § 588.

Habitation is found in modern law, for instance that of France, Louisiana, and Spain.[67] But modern law follows the earlier Roman rule of not allowing the alienation of a habitation.[68]

Services defined. This servitude consisted in the right to profit from the use of another's slave or animal.[69] There was very little difference between the operae and the usus of slaves. The servitude of services has exerted no influence on modern law. § 594

[67] *Civil code* of France, 625 et seq.; Louisiana, 627; Spain, 523 et seq.; Porto Rico, 522 et seq.

[68] *Civil code* of France, 631; Louisiana, 643; Spain, 525; Porto Rico, 527.

[69] See *Dig.* 7, 7; *Dig.* 33, 2.

CHAPTER II

PRAEDIAL SERVITUDES, OR SERVITUDES OF LAND[1]

§ 595 **Nature of praedial servitudes.** In Roman law, praedial servitudes were created in one piece of land for the benefit of another piece of land.[2] And the right of servitude went with the land benefited; the successive owners of land for whose advantage the servitude was granted, could exercise the right of servitude against the successive owners of the land burdened with the servitude.[3] In other words, *land* — and not persons — was the beneficiary.

The Roman conception of a praedial servitude has descended into modern law. For instance the Spanish Civil Code reads[4]: "A servitude is a charge imposed upon an immovable for the benefit of another belonging to a different owner. Servitudes are inseparable from the land to which they actively or passively belong." Not only the basic conception but the name itself of the Roman "servitudes" has descended into modern law, as for example the "servitudes" of French law, the "servidumbres" of Spanish law, the "servitù" of Italian law, and the "servitudes" of Louisiana, California, and Quebec law.[5] And the adjective *praedial* is also found in some of the Modern Codes,[6] being employed to convey the same meaning as in the expressions *real* or *landed* servitudes.[7]

[1] This is the heading of title iv, book ii, of the Louisiana Civil Code, and also of chapter ii, title iii, book ii of the Italian Civil Code.

[2] "Praedium" or "fundus" was the technical term for a piece of land or 'estate'.

[3] See *Dig.* 8, 4, 12; *Code*, 3, 34, 3.

[4] Arts. 530, 534. See also Porto Rico, 530, 541.

[5] *Civil code* of France, 637; Spain, 536; Porto Rico, 530; Italy, 531; Louisiana, 646; California, 801; Quebec, 499. See also Switzerland, 730 (French or Italian edition).

[6] See for instance the *Civil code* of Austria, 474; Louisiana, 646; Chile, 820.

[7] See *Civil code* of Quebec, 499; Louisiana, 646.

(§ 595) The general principles of the Roman servitudes of land have, to a large extent, descended also into the Anglo-American law of easements. Sir William Markby lays emphasis on the fact that the English law of easements "has been, and still is, largely influenced by the Roman law." [8] Blackstone treats incorporeal hereditaments as resembling the Roman servitudes; and particularly as to rights of way he says that "the law of England seems to correspond with the Roman." [9]

Praedial servitudes were a product of the ancient Roman law for citizens (jus civile [10]). The land burdened with a servitude was called the servient land [11]; the land benefited by a servitude, the dominant land.[12] Both "servient" and "dominant" are to be found in the vocabulary of modern law, for instance the Anglo-American, Spanish, and Chilean.[13]

Praedial servitudes were indivisible in Roman law.[14] In other words, a servitude could not be acquired, exercised, or lost in part. And if a piece of land owned by several persons contained a servitude granted for its benefit, the exercise of the servitude (for instance, a right of way) by one holder alone would preserve the right for all the co-owners.[15] Modern law is like the Roman. For instance Spanish law makes the following provisions: "Servitudes are indivisible . . . . each part holder may use the servitude in its entirety. . . . If the dominant land belongs to several persons in common, the use of the servitude made by one of them prevents prescription with regard to the others." [16]

[8] *Elements of law*, § 403.

[9] *Commentaries*, vol. ii, pp. 36, 106.

[10] See supra vol. i, §§ 40, 44.

[11] *Dig.* 8, 1, 9; *Dig.* 8, 2, 14; *Dig.* 8, 3, 23, 2; *Dig.* 41, 1, 20, 1.

[12] *Dig.* 8, 3, 23, 2 and 4: "cui servitus debetur." The two pieces of land must be in the vicinity of each other, but these need not adjoin: *Dig.* 8, 3, frag. 5, § 1; frag. 7, § 1; *Dig.* 8, 2, 38; *Dig.* 8, 4, 7, 1; *Dig.* 8, 5, 5.

[13] Markby, *Elements of law*, § 402; *Civil code* of California, 803; Spain, 530; Porto Rico, 536; Chile, 821.

[14] *Dig.* 8,1, frag. 11. and 17; *Dig.* 8, 3, frag. 18 and 32; *Dig.* 8, 6, 6, 1.

[15] But all the co-owners, not merely one, had to join to grant a servitude: see *Dig.* 41, 5, 140, 2.

[16] *Civil code* of Spain, 534, 548; Porto Rico, 542, 555.

§ 596 **Modes of creating praedial servitudes.** In the Roman law of Justinian there were four ways of creating praedial servitudes: by contract[17]; by will[18]; by judicial decree or adjudication[19]; and by prescription.[20] In the Republican and Early Imperial law there were two special modes of creating praedial servitudes, neither of which existed in the time of Justinian: by *mancipatio* — the ancient formal conveyance by money and the balance[21]; and by *in jure cessio* — a kind of fictitious lawsuit.[22]

§ 597 **Modes of extinguishing praedial servitudes.** In the Roman law of Justinian there were four ways of terminating praedial servitudes. 1. By merger, when there is a consolidation or union of the ownerships of both the dominant and servient land in one and the same person.[23] Merger is also a modern law mode of terminating a servitude of land.[24]

2. By renunciation, or voluntary surrender, of the right of servitude by the person entitled to it.[25] Renunciation is also a modern law mode.[26] 3. By non-user for the period of prescription.[27] Modern law is the same.[28] 4. By destruction of either the dominant or the servient land.[29] Modern law is similar to the Roman.[30]

[17] *Inst.* 2, 3, 4.

[18] *Id.* and Dig. 33, 3, 1.

[19] *Dig.* 10, 2, 22, 3.

[20] *Dig.* 8, 5, 10, pr; *Code*, 7, 33, 12, 4.

[21] Gaius, 2, 23. See supra §§ 570, 573.

[22] Gaius, 2, 30.

[23] *Dig.* 8, 6, 1; *Dig.* 8, 2, 30.

[24] See for instance *Civil code* of Spain, 546; Porto Rico, 553; California, 811.

[25] *Dig.* 8, 3, 34, pr. (remissio); *Dig.* 8, 6, 8, pr. See also *Inst.* 2, 3, 3; *Dig.* 7, 1, 64–5; Gaius, 2, 29–30; Paulus, *Sent.* 3, 6, 32.

[26] *Civil code* of Spain, 546; Porto Rico, 553.

[27] Justinian raised the period of prescription for releasing land from a servitude from 2 years (Paulus, *Sent.* 1, 17, 1) to 10 or 20 years — the latter when both parties did not live in the same provinces: *Code*, 3, 34, 13.

[28] *Civil code* of California, 811; Spain, 537, 546; Porto Rico, 553–4; Japan, 167. The period of prescription by non-user is 20 years in both Japanese and Spanish law.

[29] *Dig.* 8, 2, 20, 2. See *Inst.* 2, 4, 1, and 3. But if either the dominant or the servient land was restored, the servitude revived: *Dig.* 8, 6, 14, pr.; *Dig.* 8, 2, 20, 2. And this principle of law was applicable also to personal servitudes (supra § 585): *Dig.* 7, 4, 23.

[30] *Civil code* of Spain, 546; Porto Rico, 553; California, 811.

Classifications of praedial servitudes: (1) rural and urban. § 598
Servitudes of land have been classified in two ways: rural and urban, positive and negative. The first division was formulated by the Roman jurists.[31] A rural servitude related to land alone; an urban servitude to land with buildings.[32] This distinction is based on the nature of the dominant land. This Roman division of servitudes of land still exists in modern law.[33] For instance, it is stated in the Louisiana Civil Code that "all servitudes are established either for the use of houses or for the use of lands. Those of the first kind are called *urban* servitudes, whether the buildings to which they are due be situated in the city or in the country. Those of the second kind are called *rural* servitudes."[34]

Classifications of praedial servitudes: (2) positive and negative. § 599
This second division of servitudes of land is far more practical and logical than the first[35]; and, although never officially formulated by the Roman jurists, it lies at the foundation of their decisions as to praedial servitudes.[36] A servitude benefiting the owner of the dominant land who has some actual right exercisable on the servient land, is a positive servitude.[37] A servitude giving the owner of the dominant land a right to prohibit the owner of the servient land from using his property as he would except for the servitude, is a negative servitude.[38] This is a distinction of servitudes based on the nature of the servitude itself.

This classification of servitudes exists in modern jurisprudence. For instance the following provisions of Spanish law are pertinent: "Servitudes are also positive and negative. A positive servitude is one which imposes upon the owner of

[31] "Servitutes rusticorum praediorum et urbanorum": *Dig.* 8, 1, 1; *Inst.* 2, 3, pr., and § 1.

[32] *Id.*

[33] *Civil code* of France, 687 ("servitudes urbaines" and "rurales"), Louisiana, 710 ("urban" and "rural"); Austria, 474 (Italian text: "servitù rustiche" and "urbane").

[34] Art. 710.

[35] See supra § 598.

[36] See *Dig.* 8, 1, 15, 1.

[37] *Id.:* hence termed by modern Civilians *servitude in faciendo* or *habendo.*

[38] *Id.:* hence termed a *servitude in prohibendo.*

the servient tenement the obligation of allowing something to be done or of doing it himself, and a negative servitude is one which prohibits the owner of the servient tenement doing something which would be lawful for him to do if the servitude did not exist."[39]

§ 600 **The principal servitudes of land.** The most important of the Roman *positive* servitudes were: right of way,[40] right to draw water[41] right to drive cattle to water,[42] right to dig sand,[43] right to burn lime,[44] right to project a roof or balcony over adjoining land,[45] right of conducting water,[46] right of sewer,[47] right to place beams in an adjoining wall,[48] right to support houses on a party wall.[49] The most important of the Roman *negative* servitudes were: to prevent the adjoining proprietor from building above a certain height[50] or its opposite,[51] the right to daylight[52] or its opposite,[53] the right of prospect[54] or its opposite,[55] and the right of turning water on a neighbor's land.[56]

Almost all these Roman praedial servitudes are found in modern law.[57] In particular the Anglo-American law of easements includes a great many of these Roman servitudes.[58] One excellent illustration is the American case of *Campbell* v. *Mesier*,[59] decided in the year 1820 in New York. This case concerned a ruinous party wall which had been rebuilt by one adjoining owner; and the question was, could the other adjoining owner be compelled to contribute to this expense? The illustrious Chancellor Kent held that the adjoining owner was liable for contribution; and he not only traced the right of contribution to the Roman law, but also cited a passage from

[39] *Civil code* of Spain, 533; Porto Rico, 540.
[40] *Iter, actus* and *via.*
[41] *S. aquaeductus hauriendae.*
[42] *S. pecoris ad aquam adpulsus.*
[43] *S. arenae fodiendae.*
[44] *S. calcis coquendae.*
[45] *S. protegendi* or *S. projiciendi.*
[46] *S. aquaeductus.*
[47] *S. cloacae.*
[48] *S. tigni immittendi.*
[49] *S. oneris ferendi.*
[50] *S. altius non tollendi.*
[51] *S. altius tollendi.*
[52] *S. ne luminibus.*
[53] *S. luminibus.*
[54] *S. prospectus.*
[55] *S. luminibus officiendi.*
[56] *S. stillicidii non avertendi.*
[57] *See infra* vol. iii, § 996.
[58] See Williams, *Inst. of Justinian*[2], pp. 83–8.
[59] Johns. Chancery, 334.

the Roman jurist Papinian which held that contribution could be enforced.[60] (§ 600)

Another and very striking example of the descent of servitudes into Anglo-American law is seen in the famous case of *Acton* v. *Blundell*,[61] decided in the year 1843 in England. This case concerned the fullness of the right to draw water, when the exercise of this right, in good faith and not maliciously, caused the well of another landowner, whose property was situated just above, to run dry. Lord Tindal held that the landowner, whose well was caused to run dry, could not sue the first landowner for damages. And because neither party to the litigation cited any authority in point, Lord Tindal based his decision on a similar decision made by the Roman jurists Marcellus and Ulpian.[62] And this Roman doctrine, that there is a property right in percolating underground waters, was reaffirmed in England in 1856 in the House of Lords case of *Chesemore* v. *Richards*.[63]

In the United States this Roman-English rule as to the use of percolating waters is law in Virginia, Oregon, South Dakota, Connecticut, Kansas, Wisconsin, and originally in New York and Pennsylvania.[64] Moreover, a Vermont case went so far as to hold that even the presence of malice makes no difference.[65] But this is contrary to the other American, the English, and Roman authorities which permit an action in damages where there is malice present.[66] Now lately in American law the strict Roman-English doctrine of property right in percolating waters has been modified in some states to this extent: the owner must make a reasonable use of the percolating water. This restriction on absolute ownership

[60] *Dig.* 17, 2, 52, 10.

[61] Meeson and Welsby's Excheq. Reports, 124.

[62] *Dig.* 39, 3, 1, 12.

[63] H. L. Cases 349, affirming *Acton* v. *Blundell*.

[64] *Miller* v. *Black Rock*, 99 Va. 747; *Taylor* v. *Welch*, 6 Ore. 198; *Metcalf* v. *Nelson*, 8 S. D. 87; *Wheatley* v. *Baugh*, 25 Pa. St. 528; *Roath* v. *Driscoll*, 20 Conn. 533; *Delhi* v. *Youmans*, 50 Barb. (N. Y.) 316; *Emporia* v. *Soden*, 25 Kansas, 588; Washburn, *Easements*, § 533; *Huber* v. *Merkel*, 117 Wis. 355.

[65] *Chatfield* v. *Wilson*, 48 Vt. 49.

[66] See *Acton* v. *Blundell* and American cases two notes supra.

(§ 600) is now the law in New Jersey, New Hampshire, Massachusetts, Minnesota, Iowa, Indiana, California, West Virginia, and now also in Pennsylvania and New York.[67] Hence the American law is now divided on this doctrine: certain states permitting absolute ownership, others only a reasonable use. These latter states can justify their view only on the ground that in these days of powerful machinery one man is able to very easily deprive all his neighbors of all underground water.

[67] *Bassett* v. *Salisbury*, 43 N. H. 569; *Swett* v. *Cutts*, 50 N. H. 439; *Hart* v. *Jamaica*, 133 Mass. 488; *Cohen* v. *Canada Land Co.*, 142 Cal. 437; *Katz* v. *Walkinshaw*, 141 Cal. 116, 64 L. R. A. 236; *Forbell* v. *N. Y.*, 164 N. Y. 522; *Haldeman* v. *Bruckhart*, 45 Pa. St. 514; *Erickson* v. *Crookston Water Co.*, 100 Minn. 481; *Barclay* v. *Abraham*, 121 Iowa, 619, 64 L. R. A. 236 and note; *Reisert* v. *N. Y.*, 174 N. Y. 196; *Gognon* v. *French Lick*, 163 Ind. 687; *Pence* v. *Carney*, 58 W. Va. 296; *Meeker* v. *City of E. Orange*, 70 Atl. 360.

CHAPTER III

PRAETORIAN SERVITUDES

Nature of praetorian servitudes. To the legal genius of Roman praetors is due the development of certain dismemberments of the right of ownership which are conveniently termed praetorian servitudes: namely emphyteusis, superficies, pledge, mortgage, and lien. Quite correctly do the German, Swiss, and Japanese Civil Codes emphasize them[1] as modifications of ownership by discussing them under the subject of ownership.[2] But there was also a contractual aspect to the praetorian dismemberments of ownership[3]: which will explain why these are treated under the subject of contracts[4] in the French, Spanish, Italian, Louisiana, Chilean and other codes modeled on the French Civil Code. § 601

1. EMPHYTEUSIS

Emphyteusis defined. Emphyteusis was either a perpetua lease of land or a lease of land for a very long period of time, conditioned on the payment of an annual rent; and if the rent was not paid, the grant was forfeited.[5] Although the holder of an emphyteusis was not owner of the property, yet he had actions to protect his right to the property against all possessors.[6] The grantor or holder of the theoretical right of owner- § 602

[1] As to the survival of the praetorian servitudes in modern law, see infra vol. iii, § 996.

[2] The same is partially true also of the Quebec Civil Code. Hunter, Sohm, and Morey also in their Roman law treatises discuss them under the subject of ownership.

[3] See for instance *Inst.* 3, 24, 3, as to emphyteusis.

[4] See infra vol. iii, § 996.

[5] *Dig.* 6, 3, 1–3. The rent or fixed sum was called *canon*, *pensio*, *vectigal*, or *reditus*.

[6] *Dig.* 6, 3, 1, 1. In other words the grantee of the emphyteusis had a right in rem. And this was originally protected by praetorian actions: *Dig.* 6, 2, 12, 2 (the *actio Publiciana*).

ship was called *dominus empyhteuseos*, and the grantee or holder of the emphyteusis was called *emphyteuta* or *emphyteuticary*.[7]

The Roman emphyteusis has descended into modern law.[8] For instance in Spanish law "an annuity is called emphyteutic (censo enfiteutico) when a person transfers to another the beneficial ownership of an estate,[9] reserving to himself the legal ownership and a right to receive from the emphyteuticary an annual income in recognition of such ownership. . . . The nature of the annuity requires that the transfer . . . be perpetual or for an unlimited time.[10]"

In regard to the Roman origin of emphyteusis, this kind of tenure arose out of the long or perpetual leases of Roman public lands[11] to individuals. The advantages were so many that municipal and other corporations adopted this same tenure, for it relieved corporations from all concern in the management of their landed property and gave them in exchange a perpetual rent. Finally, for like reasons, individuals resorted to emphyteusis to improve large estates of land.[12] For three centuries subsequent to the time of the Roman jurist Gaius the character of emphyteusis was controverted. Finally the discussion was settled by a decision of the Emperor Zeno that emphyteusis is not either a sale or a letting and hiring, but is a special contract by itself.[13]

§ 603 **Modes of creating and of extinguishing an emphyteusis.** In the Roman law of Justinian there were three ways of creating an emphyteusis: by contract, by will, and by prescription.[14]

[7] The latter term is used but rarely in the sources, being of late origin (*Inst.* 3, 24, 3, for instance, uses "emphyteuticarius" to denote the holder of an emphyteusis).

[8] *Civil code* of Japan, 270–9; Spain, 1605 et seq.; Porto Rico, 1508.

[9] The Spanish word is "finca" (land).

[10] *Civil code* of Porto Rico, 1508, 1511; Spain, 1605, 1608.

[11] "Agri vectigales."

[12] See on the development of emphyteusis, Sohm (Ledlie[3]), *Roman law*, p. 348.

[13] Gaius, 3, 145; *Inst.* 3, 24, 3; *Code*, 4, 66, 1. It is not uncommon in Anglo-American law to enact a statute in order to settle a point of law rendered doubtful by conflicting decisions: see Williams, *Inst. of Justinian*[2], p. 218.

[14] The sources give only contract (*Code*, 4, 66, 1; *Inst*, 3, 24, 3). But, by analogy to servitudes, will and prescription are inferred (although this

The following were the principal modes of extinguishing an emphyteusis: destruction of the property[15]; renunciation or voluntary surrender by the emphyteuticary[16]; forfeiture by the emphyteuticary[17]; merger of the emphyteusis and the bare ownership[18]; and prescription.[19]

Rights of the emphyteuticary. The rights of the holder or grantee of an emphyteusis were almost as complete as those of the owner,[20] the only important restriction being that he must not seriously impair the value of the property standing as security for the rent.[21] §604

The emphyteuticary could sell his right, subject however to the prior right of the naked owner to be informed of the price offered to the tenant and to buy it for this amount — called the owner's right of pre-emption.[22] But if the naked owner declined to purchase, the emphyteuticary could sell out to whom he saw fit without the naked owner's consent.[23] This right of pre-emption is found in modern law, for instance the Spanish.[24] The law of England has also recognized the right of pre-emption in one case: "to the original vendor of lands to a company of lands which have become superfluous."[25]

has been disputed): *Dig.* 6, 2, 12, 2; *Code*, 7, 33, 12, 4; *Code*, 11, 62 (61), 4; *Code*, 7, 39, 8, 1; Mackeldey (Dropsie), *Roman law*[14], 329; Hunter, *Roman law*[4], p. 428.

[15] *Inst.* 3, 24, 3; *Code*, 4, 66, 1.

[16] It is doubtful if the emphyteuta could surrender the land against the will of the owner: *Code*, 11, 62 (61), 3.

[17] Forfeiture occurred if the emphyteuta failed to pay his rent (*Code*, 4, 66, 2; *Nov.* 7, 3, 2), or alienated the emphyteusis without notice to the bare legal owner (*Code*, 4, 66, 3), or committed serious waste (Nov. 120, 8), or died without heirs (unless the State, *fiscus*, succeeded to the bona vacantia).

[18] See Hunter, *Roman law*[4], p. 428.

[19] See Mackeldey (Dropsie), *Roman law*[14], § 330, for these and additional modes of extinction.

[20] On the extent of the emphyteuta's rights, see *Dig.* 22, 1, 25, 1; *Code*, 4, 66, 3; *Code*, 11, 71 (70), 1 and 3; *Dig.* 30, 71, 5–6; *Inst.* 3, 24, 3; *Nov.* 120, 8; *Dig.* 13, 7, 16, 2; *Dig.* 7, 4, 1, pr.

[21] *Nov.* 120, 8.

[22] *Code*, 4, 66, 3. It is sometimes called *jus protimiseos.*

[23] *Id.*

[24] *Civil code* of Spain, 1637; Porto Rico, 1540.

[25] Williams, *Inst. of Justinian*[2], p. 218.

In Roman law the holder of the emphyteusis could also mortgage it: for the power to sell implies the power to mortgage. Modern law is the same, for instance the Japanese.[26] In Roman law the emphyteuticary acquired the fruits of the property granted to him.[27] And he could transmit the emphyteusis to his heirs.[28] Both of these rights are found in modern law, for instance the Spanish.[29]

§ 605 **Duties of the emphyteuticary.** All the burdens of ownership fell upon the holder of the emphyteusis. He must pay the taxes.[30] He must pay the rent at the time agreed upon.[31] But it was finally settled that the naked owner of the land could not eject him until the emphyteuticary had failed for three years to pay his rent.[32] He was responsible for waste.[33] These rules have descended into modern law. For instance Spanish law is the same as the Roman: it similarly provides for the payment of taxes and charges affecting the property, and for ejectment after non-payment of the rent for three consecutive years.[34]

§ 606 **Rights and duties of the legal owner.** The holder of the bare title of ownership (dominus emphyteuseos) was bound to admit the buyer of an emphyteusis into possession, and for his trouble he was entitled to a fine of 2% of the purchase money.[35] The medieval Civilians or Romanists bestowed on this fine the special name of *laudemium*.[36] This 2% Roman law 'perquisite' has descended into modern law, for instance the Spanish which provides for a 2% fine, called *laudemio*, to go to the holder of the bare title of ownership.[37]

[26] *Civil code*, 369.

[27] By analogy from *Dig.* 23, 3, frag. 10, 1; frag. 32 and 65.

[28] *Nov.* 7, 3 and *Nov.* 120, 6, § 1. See also *Dig.* 30, 71, 5–6.

[29] *Civil code* of Spain, 1632 et seq.; Porto Rico, 1553 et seq.

[30] *Code*, 4, 66, 2; *Code*, 10, 16, 2.

[31] *Inst.* 3, 24, 3; *Code*, 4, 66, 2.

[32] *Code*, 4, 66, 2. See *Nov.* 7, 3, 2, reducing the period to two years for an ecclesiastical corporation.

[33] *Nov.* 120, 8.

[34] *Civil code* of Porto Rico, 1525, 1551; Spain, 1622, 1648,

[35] "Quinquagesimam partem pretii vel aestimationis": *Code*, 4, 66, 3, 4.

[36] See Brissonius, *De verb. significatione* (Heineccius), "laudemium"; supra vol. i, §§ 210, 216, 248, 334.

[37] *Civil code* of Spain, 1644–5; Porto Rico, 1547–8.

Comparison of emphyteusis with praedial servitudes and short-term leases. § 607 Emphyteusis was a far better and wider right in rem than a servitude of land.[38] The holder of an emphyteusis was almost in the legal position of an owner, while the holder of a servitude had only at best a right of enjoyment — he possessed the servitude and not the land. The lessee for a short term had but an obligatory right in personam,[39] while the holder of an emphyteusis had a right in rem available against the world.

Influence of emphyteusis on Anglo-American law. § 608 While emphyteusis has thoroughly survived in Continental European and allied systems of law,[40] it has no exact counterpart in Anglo-American law.[41] The double 'ownership' of emphyteusis — the holder of the bare legal title with a reversionary right, and the beneficial right of the emphyteuticary — certainly has influenced the medieval feudal tenures upon which English "estates in fee" are founded.[42] Moreover, as is held in the Institutes of Justinian,[43] there was little difference between lands conveyed outright by sale and lands in emphyteusis which are to be enjoyed forever, provided a certain rent be paid; so too in Anglo-American law there is little practical difference between a long-term lease — for instance one hundred years — and a fee simple estate.

An equitable estate in Anglo-American law is like the Roman emphyteusis in that the equitable owner is protected by action if dispossessed, just as the emphyteuticary was in the same case.[44] The ancient copyhold estate in the law of England, the holder of which had a "fixity of tenure as long as he paid his rent," is somewhat reminiscent of the position of the Roman emphyteuticary.[45] The English leasehold at Common Law

[38] See supra § 595.

[39] *Id.* § 569.

[40] See infra vol. iii, § 996.

[41] Williams, *Inst. of Justinian*[2], p. 217.

[42] See Maine, *Ancient law*, ch. 8 (emphyteusis).

[43] *Inst.* 3, 24, 3.

[44] Williams, *Inst.*[2] etc., p. 218.

[45] Williams, *Id.*

is like an emphyteusis in this respect: the tenant cannot claim compensation for improvements.[46] But, as Sir Henry Maine remarks, "the right of pre-emption and a certain amount of control over the mode of cultivation" differentiate the emphyteusis from any English form of tenure.[47]

2. SUPERFICIES

§ 609 **Superficies defined.** Superficies stood to houses in the same relation as emphyteusis did to land without buildings.[48] It was a perpetual or very long lease of a building, subject to the payment of a rent.[49] The holder of the superficies, called the *superficiary*,[50] exercised the right of an owner,[51] and could sell his right or transmit it to his heirs.

The legal position of the superficiary was the same as that of the emphyteuticary; and the superficiary had practically the same rights and duties as the holder of an emphyteusis.[52] The rights of the superficiary were protected by suitable actions at law against all possessors.[53] Superficies were, so far as possible, created and extinguished in the same ways as emphyteusis.[54]

§ 610 **Comparison of superficies with praedial servitudes and short-term leases.** A superficies differed from a praedial

[46] *Id.*

[47] Maine's *Ancient law*, ch. 8.

[48] As to the nature of superficies, see *Dig.* 23, 3, 32; *Dig.* 31, 39; *Dig.* 43, 18, 2.

[49] *Dig.* 6, 1, 74; *Dig.* 6, 1, 73, 1; *Dig.* 43, 18, 2; Girard, *Textes*[3], p. 795. The rent was usually paid annually, and was termed *solarium* or *pensio*.

[50] As in *Dig.* 13, 7, 16, 2; *Dig.* 6, 1, 73, 1: "superficiarius."

[51] *Dig.* 43, 18, 1, pr.; *Dig.* 10, 2, 10; *Dig.* 43, 18, 1, 7; *Dig.* 13, 7, 16, 2; *Dig.* 20, 1, 9, 1; *Dig.* 20, 4, 15; *Dig.* 7, 4, 1, pr.; *Dig.* 43, 18, 1, §§ 6 and 9. Superficies is not mentioned in the Institutes of Justinian.

[52] Supra §§ 602, 604–5. But the owner of the bare legal title had no pre-emption right (*jus protimiseos*): Mackeldey (Dropsie), *Roman law*[14], § 332, note. Nor was a *laudemium* payable if the superficies was sold: *Id.*

[53] The superficiary could bring either an *actio utilis in rem* (*Dig.* 43, 18, 1, §§ 3–4; *Dig.* 6, 1, 74; *Dig.* 6, 2, 12, 3), or the interdict *de superficiebus* (*Dig.* 43, 18, 1, pr.; *Dig.* 43. 17, 3, 7; see also *Dig.* 43, 16, 1, 5; *Dig.* 43, 26, 2).

[54] See supra § 603; Mackeldey (Dropsie), *Roman law*[14], § 333.

servitude and a short-term lease just as emphyteusis did.[55] Superficies was far superior to either. It was virtually ownership of a building, apart from the land.

Survival of superficies in modern law. Superficies has descended into nearly all modern Continental European and allied legal systems.[56] For instance the Roman law definition and doctrines of superficies have traveled to Asia and are repeated in modern Japanese law.[57] In the law of England there is quite a resemblance between long-term building leases and the Roman superficies.[58] The special feature of a "fine" payable when this English long building lease expires or "falls in," is somewhat reminiscent of the *laudemium* in emphyteusis, which[59] praetorian dismemberment of ownership was related to superficies. § 611

3. PLEDGE (PIGNUS), MORTGAGE (HYPOTHECA), AND LIEN (HYPOTHECA)

Nature of pledge or of mortgage. Difference between Roman and Anglo-American law in the use of the term "pledge." In both Roman and modern law a right of pledge or of mortgage is a right in rem,[60] which enables the person entitled to it to secure payment of a claim through the medium of the thing pledged or mortgaged. A creditor without a pledge or a mortgage has only an obligatory right — a right in personam[61] — against his debtor; but a creditor with a right of pledge has also a right in rem — that is, the creditor by his own act may satisfy his claim by selling the thing serving as security for the debt. To the legal genius of Roman praetors is due the creation and evolution of a creditor's securities known as pledge (pignus), mortgage (hypotheca), and lien (hypotheca). § 612

[55] See supra § 607.

[56] See infra vol. iii, § 996.

[57] *Civil code*, 268–9.

[58] Williams, *Inst. of Justinian*[2], p. 91.

[59] But the object of the Roman fine was entirely different, — see supra § 606.

[60] See supra § 569.

[61] *Id.*

In Roman law the term pledge (pignus) was not limited to movables, and might be applied also to immovables.[62] But in English and American law the term "pledge" is confined solely to personal property or movables: a pledge of real property or immovables is termed a "mortgage," although sometimes "mortgage" is used of personal property, as for instance "chattel mortgage."[63]

§ 613 **Evolution of the Roman law of pledge: (1) pledges with possession. 1. Fiducia.** In the Justinian Roman law existed pledges[64] with or without possession. These, however, really constituted but one law of pledge[65]; and hence may be treated together. But the Roman law of pledge cannot be understood without examining the successive transformations through which the contract of pledge passed. Now the first phase of the law of pledge was the creation and development of a right of pledge accompanied by possession. The pledge without possession was developed later. The Roman pledges with possession were known technically as fiducia and pignus; both arose during the Republic; but in the time of Justinian only pignus is found — fiducia having become obsolete several centuries earlier.

Fiducia was the earliest form of pledge. Here, to safeguard a creditor, the ownership of the thing itself was transferred[66] outright to the creditor by the debtor, subject to an agreement (*fiducia*) that as soon as the debt was paid the ownership should be retransferred to the debtor.[67] This made a highly dangerous situation for the debtor: the creditor, once having

[62] *Inst.* 4, 6, 7; *Dig.* 20, 1, 5, 1; *Dig.* 20, 1, 9, 1. But see *Dig.* 50, 16, 238, 2, which states that pignus is confined to movables (a statement endorsed by *Inst.* 4, 6, 7 to this extent — that pignus refers especially, but not exclusively, to movable property).

[63] See Black, *Law dictionary*[2], pp. 194, 793, 905; Williams, *Inst. of Justinian*[2], p. 114.

[64] Using the term "pledge" in its widest Roman sense of being applicable to immovable as well as to movable property, — supra § 612.

[65] See *Dig.* 20, 1, 5, 1.

[66] By *mancipatio* or *cessio in jure:* see Gaius, 2, 59; supra § 570; and infra § 626.

[67] Gaius, 2, 60; Girard, *Textes*[3], pp. 783, 786.

become owner, could lawfully sell or dispose of the property.[68] And if he did, the debtor had no remedy against the third party to whom the property passed.[69] The debtor had parted with his ownership; all he could do was to sue the creditor for damages. In this early form of pledging property by conveying it, a right of pledge — in the proper sense of the term — was unknown. A debtor might be ready to repay the money borrowed, but meanwhile the lender had sold the property — an unjust and odious state of affairs. Fiducia was given its death-blow by the Emperor Constantine,[70] and was long obsolete in the time of Justinian.[71]

(1) **Pledges with possession. 2. Pignus.** The disadvantages of fiducia[72] were responsible for the development of another method of giving a creditor security for a loan — namely pignus, or pledge properly so-called. Here, instead of making the creditor owner of the thing serving as his security, the debtor merely delivered possession of the property to the creditor,[73] and retook the property as soon as he paid his debt.[74] § 614

But this arrangement, while not involving much risk for the debtor, caused the following pronounced disadvantage for the creditor: if the debtor failed to pay at the appointed time, it was impossible for the creditor (unless he had been specially empowered to do so by the debtor [75]) to dispose of the property pledged and pay himself out of the proceeds of the sale.[76]

[68] Paulus, *Sent.* 2, 13, 5.

[69] *Id.* 2, 13, 6.

[70] He abolished the *lex commissoria*, or essential condition, of fiducia — namely, that the pledge should be forfeited to the creditor, if the money borrowed was not repaid on the day named in the contract: *Code*, 8, 34 (35), 3.

[71] The ancient *mancipatio* and *in jure cessio*, the modes of forming a *contractus fiduciae*, ceased to exist long before Justinian's reign: *Code Theod.* 15, 14, 9 (A.D. 395).

[72] See supra § 613.

[73] See *Inst.* 4, 6, 7, on *pignus*.

[74] *Inst.* 3, 14, 4.

[75] By the so-called *pactum de vendendo:* Gaius, 2, 64; *Inst.* 2, 8, 1.

[76] Forfeiture of ownership in the pledge was possible only when the so-called *lex commissoria* (see supra § 613, next to last note) had been made a part of the contract of pignus.

Furthermore, the security of pignus always involved the necessity of parting with the possession of the property subjected to it; but this condition was not always possible for an owner where a security was agreed upon — for instance where a tenant-farmer (colonus) had agreed that his stock and implements (invecta et illata)[77] should serve as a pledge for satisfying the landlord's claim if he failed to pay the rent.[78]

§615 **Evolution of the Roman law of pledge: (2) pledge without possession — hypotheca.** A last step was taken in the Roman law of pledge by the praetorian recognition and enforcement of a simple agreement[79] that certain property of a debtor, the possession of which he retained,[80] should be bound by the debt and should be liable, if the debt was not paid, to satisfy his creditor's claim. In other words the debtor agreed that his property, possession of which was not delivered to the creditor, should be a security for the debt and be subject to the creditor's right of sale. This agreement was called hypotheca. Both the name and the security came from Greek law.[81]

Hypotheca was wholly void under the old Roman law.[82] But the praetors made it valid: first, when a tenant-farmer had hypothecated his stock and implements to the landlord[83]; and subsequently to *all* creditors having hypothecary agreements with their creditors.[84] Thus was a geniune dismemberment of ownership created and sanctioned by praetorian Roman law.[85]

The Roman law technical term for mortgage — "hypotheca" — has survived literally in many modern systems of

[77] See *Dig.* 20, 2, 6; *Dig.* 2, 14, 4, pr.

[78] See infra §615.

[79] No writing or any other formality was necessary: *Dig.* 13, 7, 1, pr.

[80] *Id.*

[81] Sohm (Ledlie[3]), *Roman law*, p. 354.

[82] That is, the *jus civile*. See supra vol. i, §§33, 37–40.

[83] The *interdictum Salvianum*, and the *actio Serviana:* Gaius, 4, 147; *Inst.* 4, 15, 3; *Inst.* 4, 6, 7. See *Dig.* 2, 14, 4, pr.; supra §614. The primary notion of hypotheca is found during the Republic as early as the time of Cato, — *De re rustica*, 146. The *actio Serviana* was invented by one Servius who lived before Cicero (Hunter, *Roman law*[4], p. 433), in whose time hypotheca existed in all its fullness (*Epist. ad familiares*, 13, 56).

[84] The *actio quasi Serviana* or *actio hypothecaria:* see *Inst.* 4, 6, 7.

[85] See supra vol. i, §§41, 43–4, 60–61.

law, for instance the Spanish "hipoteca", the Italian "ipoteca", the French "hypothèque", and the Scotch "hypothec" [86] But in modern law the use of the term "hypothec" is limited to the mortgage of immovable or real property,[87] although in Roman law "hypotheca" was used to denote security composed of either movables or immovables.[88]

Distinction between pignus and hypotheca in the Justinian Roman law, and survival of this distinction in modern law. §616 Although in the law of Justinian there existed both pledges with possession and pledges without possession, the actual difference between pignus and hypotheca was slight — merely one of name, says the Roman jurist Marcian.[89] Provided that the creditor and debtor agreed that certain property was to be bound by the debt, it was of small consequence what the security was called [90]; for there was no difference between a pledge with possession and a pledge without possession so far as regards the enforcement of the security.[91]

In the final stage of the development of the Roman law of pledge the distinction between pignus and hypotheca was merely the following: the essence of pignus is the transfer of possession — pignus referring especially to movable property [92]; the essence of hypotheca is the agreement to hypothecate — that is, the retention of possession by the debtor.[93]

Modern law, like the Roman, recognizes pledges with and without possession, and draws the same Roman distinction

[86] *Civil code* of Spain, 1874; Italy, 1964; Switzerland, 824 (Italian text); France, 2114; Black, *Law dictionary*[2], p. 584, "hypothec." The Scotch hypothec denotes, as in Roman law, the security which a landlord has as creditor for rent of his tenant-farmer (see supra this § 615 and infra § 624).

[87] See for instance *Civil code* of Spain, 1876; France, 2114; Germany, 1113.

[88] *Inst.* 4, 6, 7.

[89] "Inter pignus et hypothecam tantum nominis sonus differt": *Dig.* 20, 1, 5, 1.

[90] *Inst.* 4, 6, 7.

[91] "Inter pignus autem et hypothecam quantum ad actionem hypothecariam nihil interest": *Inst.* 4, 6, 7.

[92] *Inst.* 4, 6, 7. But see *Dig.* 50, 16, 238, 2, where some jurists erroneously thought pignus was confined to movables.

[93] *Inst.* 4, 6, 7; *Dig.* 13, 7, 1, pr.

between them. For instance the Civil Code of California defines "pledge" as "a deposit of personal property by way of security for the performance of another act," and defines "mortgage" as "a contract by which specific property is hypothecated for an act without the necessity of a change of possession." [94] The Louisiana Civil Code thus very clearly and briefly restates the Roman difference between pledge and mortgage: "in pledge, the movables and effects subjected to it, are put in the possession of the creditor . . . while the mortgage only subjects to the rights of the creditor the property on which it is imposed, without it being necessary that he should have actual possession." [95]

The Anglo-American system of mortgages has been "much affected by the doctrines of the Civil Law, acting through the Court of Chancery." [96] Mortgage, "a security founded on the Common Law, has been perfected by a judicious and wise application of the principles of redemption of the Civil Law." [97] To Roman law can be traced the necessity for foreclosure and the protection of the equity of redemption, as established in the Court of Chancery.[98] And the tendency of American law is to regard a mortgage, although cast in the form of a conveyance of property, as a mere lien — as a pledge or security of certain property for a debt.[99] All the above-mentioned facts reveal the assimilation of the Anglo-American mortgage along the lines of the Roman hypotheca.

§617 **Antichresis.** The Roman antichresis was a special form of mortgage where the creditor was given the fruits of the mortgaged property in lieu of interest.[100] Antichresis has sur-

[94] *Civil code*, 2986, 2920. See also *Civil code* of Spain, 1863, 1876; France, 2071, 2114; Germany, 1205, 1113; Robinson, *Elementary law*[2], §§ 164, 92 (Anglo-American law).

[95] Art. 3281.

[96] Scrutton, *Roman law and the law of England*, p. 157.

[97] Coote, *Mortgages*[4], p. 1.

[98] Scrutton, *Id.* 157; infra § 621.

[99] Robinson, *Elementary law*[2], § 92; Black, *Law dictionary*[2], "mortgage."

[100] "Si antichresis facta . . . cum in usuras fructus percipiat, —" *Dig.* 20, 1, 11, 1; "ut fructus in vicem usurarum consequeretur," — *Code*, 4, 32, 17; *Dig.* 13, 7, 33. See also *Dig.* 20, 8, 2; *Code*, 4, 32, 14; *Code*, 4, 26, 6; *Dig.* 20, 1, 1, 3.

vived in modern law[101]. For instance, the Spanish Civil Code reads: "by antichresis a creditor acquires a right to receive the fruits of real property of his debtor with the obligation to apply them to the payment of interest, if due, and afterwards to the principal of his credit." [102] The definition of antichresis in Louisiana law is somewhat more elaborate: "the creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt." [103]

Creation of pignus and hypotheca. In the Imperial Roman law pignus and hypotheca became largely amalgamated.[104] The modes of creating pledge or mortgage were practically the same. And it is convenient to group these together, notwithstanding the special mode of creating implied hypothecs [105] or liens. 1. By contract.[106] This is also a mode of creating pledge or mortgage in modern law, for instance the French and Anglo-American.[107] "With the informal creation of hypotheca by nuda conventio may be compared the equitable mortgage by deposit of title deeds" in England.[108] § 618

[101] *Civil code* of France, 2085–91 ("antichrèse"); Louisiana, 3176–81 ("antichresis"); Italy, 1891–7 ("anticresi"); Spain, 1881–6 ("anticresis"); Porto Rico, 1782–7 ("antichresis"). Perhaps the old *mortuum vadium* or Welsh mortgage, in the law of England, was derived from the Roman antichresis: Williams, *Inst. of Justinian*[2], pp. 114–15.

[102] *Civil code* of Porto Rico, 1782 (Spain, 1881).

[103] *Civil code*, 3176.

[104] See supra § 616.

[105] "Hypothec" is the word employed in Scotch law to denote (like one case of the Roman hypotheca) the security which a landlord has as creditor for rent of his tenant-farmer: see Black, *Law dictionary*[2], p. 584; and supra § 615.

[106] *Pactum hypothecae:* see *Inst.* 4, 6, 7; *Dig.* 13, 7, 1, pr.; *Dig.* 20, 1, 4. In hypotheca, unlike pignus, no delivery of the property given as security was necessary, — supra §§ 615–16.

[107] *Civil code* of Louisiana, 3133 et seq., 3290 et seq. ("conventional mortgages"); France, 2073 et seq., 2124 et seq. ("hypothèques conventionnelles"); Robinson, *Elementary law*[2], § 92.

[108] Williams, *Inst. of Justinian*[2], p. 114.

2. By will.[109] 3. By judicial decree or acts, such as a decree of court giving the creditor possession of his debtor's property,[110] or a seizure of the debtor's property to enforce obedience to the court[111] or to execute its judgment.[112] This mode was especially applicable to hypotheca. Judicial decree or acts is also a mode of modern law, for instance the French and Anglo-American.[113] 4. By operation of law, such a hypothec being termed implied (tacita).[114] This mode was applicable to hypotheca and not to pignus. Modern law provides for the creation of implied hypothecs or liens by operation of law.[115] But this mode of creating a hypothec does not include prescription: a right of hypothec cannot arise from prescription.[116]

§619 **Extinction of pignus and hypotheca.** The principal modes of extinguishing pignus and hypotheca were as follows: destruction of the thing pledged or mortgaged[117]; merger (when the debtor and creditor become the same person)[118]; full satisfaction or discharge of the debt secured by the pledge or mortgage[119]; sale of the property pledged or

[109] *Dig.* 13, 7, 26, pr. See *Dig.* 34, 1, 12; *Dig.* 33, 1, 9; *Code*, 6, 43, 1.

[110] *Dig.* 13, 7, 26; *Dig.* 27, 9, 3, 1. Mackeldey (Dropsie), *Roman law*[14], § 342, gives in detail the cases of *missio in possessionem.*

[111] *Inst.* 1, 24, 3; *Dig.* 25, 4, 1, 3; *Dig.* 48, 13, 11 (9), § 6.

[112] *Dig.* 42, 1, 31. Seizure of a debtor's property in order to execute a judgment was introduced by rescript of Antoninus Pius (reigned A.D. 138–61).

[113] *Civil code* of Louisiana, 3321 et seq. ("judicial mortgages"); France, 2123 et seq. ("hypothèques judiciaires"); Robinson, *Elementary law*[2], § 92 ("judgment lien").

[114] Liens or implied hypothecs are considered in detail infra § 624.

[115] *Civil code* of Louisiana, 3311 et seq. ("legal mortgages"); France, 2121 et seq. ("hypothèques légales"); and footnotes of infra § 624; Robinson, *Elementary law*[2], § 92.

[116] This view of Thibaut and Mackeldey has met with opposition, — Mackeldey (Dropsie), *Roman law*[14], § 343, note. As to prescription, see infra §§ 645 et seq.

[117] *Dig.* 20, 6, 8, pr.; *Code*, 8, 13 (14), 25; *Dig.* 13, 7, 18, 3. But see *Dig.* 20, 1, frag. 29, § 2; frag. 35.

[118] *Dig.* 46, 3, frag. 75; frag. 95, § 2; frag. 107; *Dig.* 20, 6, 9, pr.

[119] *Dig.* 20, 1, 19; *Dig.* 13, 7, 8, 1; *Code*, 8, 28, 6. See *Dig.* 13, 7, frag. 9, §§ 3–5; frag. 13, pr.; frag. 8, 1; *Dig.* 46, 2, 18; *Code*, 8, 30 (31), 3; *Code*, 8, 27 (28) 6.

mortgaged[120]; prescription[121]; and voluntary release or renunciation (remissio) of the pledge or mortgage.[122] These Roman modes of extinction are found in modern law.[123]

Rights of the creditor: (1) right in rem, including the right of possession. The extent of the creditor's right over the property serving as a security for the debt was not small. A mortgage of a number of things taken as a whole or collectively, gave to the mortgagee title to all the increase or additions to such stock subject to the mortgage.[124] For instance, according to the Roman jurist Marcian, "when a herd is given in pledge, it includes all animals thereinafter born; and, even if on the death of its original members the whole herd be renewed, it is still held for the pledge."[125] Modern law is like the Roman.[126] A good illustration is the American case of *Cahoon* v. *Miers*,[127] the decision of which is the same as that of Marcian given above, and cites with approval the above excerpt from Marcian. § 620

When the property serving as security was actually delivered to the pledgee, the creditor's right of possession began immediately upon delivery.[128] But in cases of mere hypotheca

[120] *Code*, 8, 29 (30). But see *Dig.* 12, 1, 28; *Code*, 8, 19 (20), 1; *Code*, 6, 30, 22, §§ 8, 5, and 6. The right of sale belonging to a creditor is discussed infra § 621.

[121] *Code*, 7, 36, 1–2; *Dig.* 44, 3, 12; *Code*, 8, 44 (45), 19; *Code*, 4, 10, 7; *Code*, 7, 39, 8. But the debtor or his heirs could not terminate the right of pignus or hypotheca by acquisitive prescription (infra § 648): *Dig.* 20, 1, 1, 2; *Dig.* 41, 3, 44, 5; *Code*, 8, 14, 7. The *actio hypothecaria* was available against them for 40 years: *Code*, 7, 39, 7, 1.

[122] *Dig.* 20, 6, 8, 1; *Code*, 8, 25 (26). As to what constitutes an *implied* release, see *Dig.* 20, 6, 5, 2; *Dig.* 50, 17, 158; *Code*, 8, 25 (26), 7; Mackeldey (Dropsie), *Roman law*[14], § 358; Hunter, *Roman law*[4], p. 446. These works give also certain other minor modes of extinguishing pignus and hypotheca.

[123] For illustrations, see *Civil code* of France, 2180; Louisiana, 3411; Italy, 2029; Japan, 396; Jones, *Mortgages*[5], §§ 848 et seq., 913 et seq., 1571 et seq.

[124] *Dig.* 20, 1, 34, pr.

[125] *Dig.* 20, 1, 13, pr.

[126] *Civil code* of Spain, 1877; Porto Rico, 1878.

[127] 67 Maryland Rep. 573 (decided in 1887).

[128] He was protected by the possessory interdicts: *Dig.* 41, 3, 16; *Dig.* 10, 4, 3, 15.

the creditor's right to possess did not arise until the debtor was in default[129] — that is, did not pay the debt at the appointed time and thus made it necessary for the creditor to realize the value of his security by sale or foreclosure.[130] By virtue of his right *in rem* the creditor, in order to obtain possession, could follow and recover by suit the property, no matter into whose hands it had gone.[131] In other words, the creditor's right *in rem* was good against the whole world.[132] And modern law is the same as the Roman.[133]

§621 **Rights of the creditor: (2) satisfaction of his claim either by sale or by foreclosure.** If the debt was not paid at the appointed time, the creditor could either sell[134] the property serving as security for the debt or obtain foreclosure thereof.[135] Both sale and foreclosure are exercisable in modern law.[136]

1. Right of sale (*jus distrahendi, distractio*). So thoroughly did Roman law treat the power of sale as a part of the creditor's rights, that, even if there had been a previous agreement that there should be no power of sale, nevertheless, the creditor could sell the property serving as security, provided he gave notice of his intention to sell.[137] If there was a previous agreement as to the manner and time of the exercise of the power of sale, the creditor must observe such agreement; otherwise the creditor must follow the procedure prescribed by law, giving formal notice of his intention to sell and waiting

[129] The creditor with a hypotheca, from the moment he obtained possession, had the same power as a pledgee: see *Dig.* 13, 7, 11, 5; *Dig.* 39, 2, 34; Mackeldey (Dropsie), *Roman law*[14], § 347, note 9.

[130] See infra § 621.

[131] *Code*, 8, 13 (14), 18; *Dig.* 20, 1, 17; *Code*, 8, 13 (14), 15; *Code*, 8, 27 (28), 12. See *Dig.* 20, 1, 13, 5; *Dig.* 20, 6, 5, 1.

[132] See supra § 569.

[133] *Civil code* of France, 2114, 2166; Louisiana, 3282, 3397, 3399; see infra vol. iii, § 995.

[134] *Inst.* 2, 8, 1; *Code*, 8, 27 (28), 6. See Gaius, 2, 64.

[135] *Code*, 8, 33 (34).

[136] Robinson, *Elementary law*[2], § 92; Jones, *Mortgages*[5], §§ 1538 et seq., 1571 et seq., 1038 et seq.; Parsons, *Contracts*[8], vol. ii, p. 125, vol. iii, p. 289; *Civil code* of Spain, 1588, 1872; 1884; Porto Rico, 1759, 1773, 1785; France, 2078, 2204 et seq.; Louisiana, 3165, 3179.

[137] *Dig.* 13, 7, 4 and 5.

the necessary period of time[138]; after the sale took place, the creditor paid himself out of the proceeds and turned over the surplus (*hyperocha*[139]) to the debtor. (§ 621)

2. Right of foreclosure (*impetratio dominii*). According to the Roman law prior to Constantine, the property given to secure a debt was at once forfeited to the creditor if the debtor failed to pay on the day named in the contract.[140] But Constantine abolished this self-acting foreclosure (lex commissoria, pactum commissorium[141]). The purpose of his statute was to protect debtors from divesting themselves of the *equity of redemption* — the right to redeem property given as security after it has been forfeited upon payment of the debt, interests, and costs. This provision as to the prevention of loss of the equity of redemption has descended into Anglo-American law via Equity jurisprudence. By strict Common Law the land mortgaged was forfeited if the debt was not paid on the day of payment; but the courts of Equity not only permitted a reasonable time to redeem thereafter, but held void any condition in the loan whereby the mortgagor lost his equity of redemption.[142]

About a century before Constantine's abolition of strict foreclosure, a new kind of foreclosure had been introduced into Roman law.[143] This foreclosure became, after Constantine's legislation,[144] the established mode of foreclosure of the Later

[138] In the ante-Justinian law the creditor must notify the debtor three times of his intention to sell the security because of non-payment of the debt: Paul. *Sent.* 2, 5, 1; *Dig.* 13, 7, 4–5. But by a statute of Justinian only a single notice was required, and the creditor must wait two years from this notice (or, if not in possession, two years from the obtainment of a judicial decree of possession) before he could sell: *Code*, 8, 33 (34), 3, 1.

[139] *Dig.* 20, 4, 20.

[140] *Dig.* 18, 1, 81, pr.; *Dig.* 20, 1, 16, 9. See Paulus, *Sent.* 2, 13, 1–5,

[141] *Code*, 8, 34 (35), 3. This statute, promulgated A.D. 326, was a death-blow to the further use of *fiducia*, the earliest form of Roman pledge,— see supra § 613.

[142] Robinson, *Elementary law*[2], § 92; Bispham, Equity[5], §§150–51; Williams, *Inst. of Justinian*[2], p. 115.

[143] *Code*, 8, 33 (34), const. 1 (A.D. 229, Alexander); const. 2 (A.D. 238, Gordian).

[144] *Code*, 8, 34 (35), 3, which declared strict foreclosure void.

Imperial law, including that of Justinian. He fully developed this new and merciful kind of foreclosure,[145] allowing it only when it was impracticable to sell the property given as security by the debtor.[146] This foreclosure necessitated public notice, followed prior to Justinian by one year's delay (which Justinian raised to two years[147]), after which time the ownership of the property given as security could be acquired by the creditor on petition to the Emperor, if the debtor failed to pay all principal and interest within the period of grace allowed him.[148]

In Anglo-American law, foreclosure is an inherent right of a mortgagee. But it is not very common, the usual remedy being the right of sale.[149] It is interesting to note, in passing, that one year is a common period of grace granted by courts to a mortgagor, within which he may redeem the mortgaged property ordered by judicial decree to be sold on account of non-payment of the debt due the mortgagee.

§ 622 **Priority of creditors; preferred creditors with privileged hypothecs or liens.** When a debtor has several creditors, those having security given by him possess a superior right and are preferred to creditors without security.[150] But when the same property serves as security to each of several creditors, and it is not adequate to pay them all, the question of which creditor is preferred becomes very important. Ordinarily priority is thus determined: the earlier mortgage excludes the later,[151] unless there are hypothecs specially preferred by

[145] *Code*, 8, 33 (34), 3 (A.D. 530).

[146] *Id.* 3, § 2.

[147] *Id.* See *Code*, 8, 33 (34), 2, for the ante-Justinian period of one year fixed by the emperor Gordian.

[148] *Code*, 8, 33 (34), 3.

[149] See Williams, *Inst. of Justinian*[2], p. 116; Jones, *Mortgages*[5], § 1571; Black, *Law dictionary*[2], "foreclosure."

[150] *Code*, 8, 17 (18), 9. It is also an elementary proposition of modern law that the holder of a right *in rem* has a superior right to the *holder* of a right *in personam*, and that in case of conflict the former right has priority over the latter: see for instance *Civil code* of Spain, 1926; Porto Rico, 1827.

[151] That is, the first takes precedence of all others, the second excludes the third, etc.

law (*privilegia*).[152] These rights of preference are still termed "privileges" in Louisiana law.[153] (§ 622)

The principal examples of Roman preferred or privileged claims were the following: 1. The lien of the State for taxes.[154] 2. The lien of the wife for her dowry.[155] 3. The lien of a creditor advancing money for acquiring property, or for building or repairing a house, or for fitting out a ship.[156] 4. A mortgage prepared by a notary sealed before witnesses had priority over a hypotheca made by a private writing not executed with these formalities.[157]

The Anglo-American doctrine of "tacking" mortgages — the act of a third mortgagee, who by purchasing the first mortgage and joining its lien to his own thus obtains priority over the second mortgagee — was recognized to some extent in Roman law.[158]

[152] ROMAN LAW: *Dig.* 20, 4, frag. 11, pr., and § 1; frag. 12, § 2; *Code*, 8, 17 (19), 8. See *Code*, 8, 18 (19); *Dig.* 13, 7, 20, 1. MODERN LAW: *Civil code* of France, 2095, 2103; Italy, 2007–8, 1949–50, 1952–3; Spain, 1926–7; Porto Rico, 1823–4; Louisiana, 3329, 3186; *Green's Appeal*, 97 Pennsylvania Rep. 347. The Anglo-American maxim "qui potior est tempore, potior est jure" (he who is first in time is first in right — Broom, *Maxims*, p. 353) came from Roman law via Canon Law: see *Code*, 8, 17 (18), 3 (4); *in Sext.* 5, 12 *De regulis juris*, 54; 4 Coke, 90 a. The special preference given by law (privilegium) to certain hypothecs is sometimes called *jus praelationis* by medieval Civilians.

[153] *Civil code*, 3182 et seq., which articles are based on the French law of "privilèges" (*Civil code*, 2095 et seq.).

[154] *Code*, 4, 46, 1; *Code*, 7, 73, 4. See infra § 624, and also *Dig.* 49, 14, 28; *Code*, 7, 73, 2.

[155] *Code*, 5, 12, 30; *Code*, 8, 17 (18), 12, 4 (1); *Inst.* 4, 6, 29; *Nov.* 97, 2 and 3; *Nov.* 109, 1. See infra § 624, and *Nov.* 91, 1.

[156] *Dig.* 20, 4, frag. 5–6, 21, § 1; *Code*, 8, 17 (18), 8; *Code*, 8, 13 (14), 17, and 27; *Nov.* 53, 5, *Nov.* 97, 3–4. Somewhat analogous is the Anglo-American lien of material-men or mechanic's lien. But the Roman hypothec of the money lender was to be stipulated for at the time of creating the debt, and the money employed for the purpose specified.

[157] *Code*, 8, 17 (18), 11. See *Nov.* 73, 1. The Roman notary or draftsman of public documents was called variously *tabellio*, *tabularius*, *notarius* (the last two words are given in the passage from the Code just cited above). There was no registration of mortgages in Roman law: Hunter, *Roman law*[4], p. 442.

[158] See cases approaching "tacking," which are given in Hunter, *Roman law*[4], p. 441.

§623 **Rights of the debtor.** In both Roman and modern law the pledgor or mortgagor continues to retain his ownership of the property given as security to the pledgee or mortgagee.[159] If the property is strictly a pledge, the fruits belong to the debtor.[160]

§624 **Lien or implied hypothec (tacita hypotheca).** In Roman law the right of hypothec might be created not only by agreement between debtor and creditor, but also by operation of law.[161] Hypothec arising *ipso jure* was called implied (*tacita*[162]). Quite similar to the Roman implied hypothecs are the Anglo-American liens and preferred claims. Roman hypothecs arising from operation of law were divisible into two groups: those giving the creditor a lien over all the property of his debtor, and those giving the creditor a lien over certain property only.

The principal implied hypothecs attaching to all the property of a debtor were as follows: 1. The lien of the State (fiscus) for the payment of taxes or debts.[163] This right of the State has descended into modern law, for instance the French, Italian, Spanish, and Anglo-American.[164] 2. The lien of a wife or her heirs on the husband's property for the recovery of her dowry.[165] This right of the wife is found in modern law, for instance the Louisiana, French, and Italian.[166] 3. The lien

[159] *Dig.* 13, 7, 35, 1; *Code*, 4, 24, 9; *Civil code* of Spain, 1859, 1869; Porto Rico, 1760; France, 2079; Louisiana, 3166. If the debtor at the time of making the pledge or mortgage was only an adverse possessor on the road to gaining ownership by prescription, he could complete the prescription: *Dig.* 41, 3, 16; see *Civil code* of Louisiana, 3411. But it was theft to alienate a movable hypothecated, without the knowledge or consent of the creditor: *Dig.* 47, 2, frag. 19, § 6; frag. 67, pr.; *Dig.* 47, 20, 3, 1.

[160] Paulus, *Sent.*, 2, 5, 2; see supra § 616; *Civil code* of Louisiana, 3168; Spain, 1868; Porto Rico, 1769; France, 2081.

[161] See supra § 618.

[162] *Inst.* 4, 6, 29: "tacitam hypothecam." *Code*, 5, 13, 1, 1b (1): "tacitas hypothecas." The right of lien was also termed "pignus tacite contrahitur": *Code*, 8, 14 (15); *Dig.* 20, 2.

[163] *Dig.* 49, 14, 46, 3; *Code*, 8, 14 (15), 1–2; *Code*, 4, 15, 3.

[164] *Civil code* of France, 2121; Italy, 1957, 1960, 1962; Spain, 1923; Black, *Law dictionary*[2], "tax-lien."

[165] *Code*, 5, 13, 1, 1b; *Inst.* 4, 6, 29. See supra § 478.

[166] *Civil code* of Louisiana, 3319; France, 2121; Italy, 1969.

of descendants in power, on the property of their paterfamilias (§ 624) as to property derived from their mother or her family.[167] 4. The lien of persons under guardianship on the property of their guardians as a protection against maladministration.[168] This right exists in modern law, for instance that of France and Louisiana.[169] 5. The lien of legatees or of beneficiaries under a bequest given in trust, on the property of the deceased to secure the payment of their legacy or trust-bequest.[170]

The principal implied hypothecs attaching to particular property of the debtor were as follows: 1. Urban hypothec or the lien of the landlord of a dwelling house, on the furniture brought into the house by his tenant.[171] 2. Rural hypothec or the lien of the landlord of a farm, on the crops of his tenant.[172] This right has descended into modern law, for instance the Scotch.[173]

[167] *Code*, 5, 9, 8, 4 (5); *Code*, 6, 61, 6, §§ 1c, 3, 4. See supra § 512.

[168] *Code*, 5, 37, 20. See supra §§ 522, 529.

[169] *Civil code* of France, 2121; Louisiana, 3314.

[170] *Code*, 6, 43, 1 and 3; *Nov.* 108, 2. See infra "legacies" (§ 706) and "fideicommissa" (§ 712). For other instances of rights of implied hypotheca over all the property of a debtor, see Mackeldey (Dropsie), *Roman law*[14], § 344.

[171] *Dig.* 13, 7, 11, 5; *Dig.* 20, 2, frag. 4, pr., frag. 2–9; *Dig.* 20, 1, 32; *Dig.* 20, 4, 11, 2; *Code*, 8, 14 (15), 5 and 7. This hypothec against a tenant (*inquilinus*) was extended by Justinian to the provinces, — *Code*, 8, 14 (15), 7.

[172] *Dig.* 20, 2, 7, pr.; *Dig.* 19, 2, 24, 1. The tenant was called *colonus*. For other instances of implied hypothec over particular property of a debtor, see Mackeldey (Dropsie), *Roman law*[14], § 345.

[173] Black, *Law dictionary*[2], pr. 584, "hypothec."

BOOK III

THE DIFFERENT MODES OF ACQUIRING OWNERSHIP

BOOK III

THE DIFFERENT MODES OF ACQUIRING OWNERSHIP[1]

The Roman distinction between singular and universal acquisition of property. In both Roman and modern law, property, in the widest sense of this word, is composed of either rights of ownership or obligations.[2] But not all obligations result in ownership: consequently it is better to make a separate treatment of obligations,[3] and confine the modes of acquisition to rights *in rem*.[4] § 625

The notion of acquisition frequently involves the idea of succession: for the person acquiring often stands in the position of succeeding to a predecessor. If it is a succession to some specific thing, this acquisition is a singular succession.[5] To acquire ownership, servitudes, and rights arising ex contractu are instances of singular succession. Universal succession is more complex. If all the rights and duties which constitute a man's legal personality and which are legally

[1] This is the heading of book iii of the Spanish Civil Code. The headings of book iii of the French and Louisiana civil codes are almost identically the same. The headings of book iii of the Quebec and Italian codes are not much different.

[2] See supra § 571.

[3] See infra book iv, "obligations." Moreover the Spanish, German, Japanese, Chilean, and Mexican civil codes treat of obligations in a separate book. But the French, Louisiana, and Italian treat of obligations under the different modes of acquiring ownership, because many obligations result in ownership.

[4] Defined supra § 569.

[5] The so-called *acquisitio singularum rerum:* see Mackeldey (Dropsie), *Roman law*[14], § 269.

(§ 625) transferable are by one act transferred to another, this is a universal succession [6] — the best example of which is an inheritance. In other words, by universal succession an aggregate of things or mass of rights is acquired; while by singular succession only single things are acquired.[7]

[6] *Acquisitio per universitatem:* see Mackeldey, *Id.*

[7] This peculiar Roman distinction as to *singulae res* and *rerum universitas* is sharply drawn in *Inst.* 2, 9, 6. See also supra § 567.

TITLE I

MODES OF ACQUIRING SINGLE THINGS

Roman modes of acquisition: (1) civil and natural. From the point of view of citizenship, modes of acquisition in Roman law were divided into modes of acquisition provided by the law for citizens (jus civile[8]) and modes provided by natural law (jus naturale[9]) for all men, non-citizens as well as citizens. This distinction was very important in the Roman law of the Late Republic and of the Early Empire prior to Caracalla.[10] § 626

The civil modes of the jus civile were *mancipatio*, delivery (*traditio*), prescription (*usucapio*), *in jure cessio*, adjudication (*adjudicatio*), and by operation of law (*lege*).[11] Of these modes, *mancipatio*, *in jure cessio*, and *lege* were obsolete in the law of Justinian.[12] The natural modes of the jus naturale were occupancy, accession, and delivery. The last, *traditio*, was of double origin, being both a civil and a natural mode of acquisition.

(2) Original and derivative. From the point of view of creating right of ownership for the first time, modes of acquisition in both Roman and modern law are either original (when ownership is created for the first time in the person of some individual who has no predecessor in title) or derivative (when ownership is transferred from one individual to another). § 627

In the Roman law of Justinian and in modern law there are

[8] The so-called *acquisitiones civiles*. See supra § 419.

[9] *Acquisitiones naturales*. See supra vol. i, § 65.

[10] See supra §§ 416, 443.

[11] Ulpian, *Reg.* 19, 2–17.

[12] *Mancipatio* (Gaius, 2, 33; Gaius 1, 119–22; Ulpian, *Reg.* 19, 3) and *in jure cessio* (Gaius, 2, 30 and 24; Ulpian *Reg.*, 19, 9) have already been explained: see supra §§ 570, 584. *Lege* (Ulpian, *Reg.* 19, 17) refers to acquisition by virtue of some statute or its equivalent: e.g., the lex Papia Poppaea (Gaius, 2, 286) deprived childless married persons of half of all inheritances and legacies.

(§ 627) six modes of acquiring ownership of single things[13]: occupancy, accession, delivery, adjudication, gift, and prescription. Of these modes occupancy, accession, and prescription are original; the remaining three — delivery, adjudication, and gift — are derivative. Legacy and trust-bequest (*fideicommissum*), although special derivative modes of acquiring single things,[14] are, for convenience, considered under testamentary succession.[15]

The *quantum* of ownership transferable by a derivative mode of acquisition was fixed for all time by this famous maxim of the Roman jurist Ulpian: "no one can transfer to another a greater right than he himself had."[16] In other words, the transferee receives the property subject to all burdens resting upon it.

[13] Singular acquisition is explained supra § 625. As to the descent of these six modes of acquisition into modern law, see infra vol. iii, 997–9.

[14] *Inst.* 2, 9, 6.

[15] See infra "wills." In the law of Justinian legacies and fideicommissa are likewise considered under "testate succession": infra §§ 706, 712.

[16] "Nemo plus juris ad alium transferre potest, quam ipse haberet": *Dig.* 50, 17, 54.

CHAPTER I

OCCUPANCY[1] (OCCUPATIO)

Occupancy defined. Occupancy consisted in acquiring a thing which as yet belongs to nobody or which has ceased to be anybody's property.[2] In modern law, occupancy is a recognized mode of acquiring ownership; it is found for instance in Anglo-American, French, German, Italian, and Spanish law.[3] In our English Common Law it is one of Bracton's borrowings from Roman law. Blackstone considers occupancy "to be the true ground and foundation of all property . . . according to that rule of the law of nations, recognized by the law of Rome."[4] §628

Cases of occupancy: (1) living creatures. Acquisition by occupancy is possible in six cases: living creatures, newly formed land, precious stones, treasure trove, res nullius, and property of an enemy taken in war. §629

Wild beasts, birds, and fishes — all untamed living creatures on the earth, or in the air, or in the waters of the earth — become at once the property of the first captor or taker.[5] According to the Louisiana Code, hunting, fowling, and fishing are some of the ways of acquiring property by occupancy.[6] Anglo-American law is like the Roman in giving the first captor a property right in wild living things.[7]

[1] The English word "occupation" is also used: see *Civil code* of Quebec, 583; Mackeldey (Dropsie), *Roman law*[14], §270 (the preceding sub-title A); Morey, *Roman law*, p. 303.

[2] *Dig.* 41, 1, 3; Gaius, 2, 66–9; *Inst.* 2, 1, §§12–18 and 47; *Dig.* 41, 2, 1, 1.

[3] Blackstone, Commentaries, vol. ii, pp. 258, 261; *Civil code* of California, 1000; Louisiana, 3411–25; France, 715–17; Italy, 711–19; Spain, 609–16. Schuster, *German law*, p. 395.

[4] Blackstone, *Id.* p. 258.

[5] *Inst.* 2, 1, 12; *Dig.* 41, 1, 1, 1.

[6] Art. 3414.

[7] Williams, *Inst. of Justinian*[2], pp. 59–60; Robinson, *Elementary law*[2], §152.

§630 (2) **Newly formed land.** Occasionally newly formed land is subject to acquisition by occupancy: for instance, an island rising in the sea belongs to the first occupant.[8] Bracton, the father of the English Common Law,[9] repeats this same Roman doctrine.[10] But in modern English and American law such an island would belong to the Crown or State,[11] just as if it were newly discovered land. The medieval and modern law of the world as to the ownership of newly discovered continents, countries, and land has been largely tinctured by the Roman private law doctrines of occupancy and possession.

§631 (3) **Precious stones.** In both Roman and modern law, whenever precious stones are found in their natural state and not contained in land owned by some person, these become the property of the first finder. The Institutes of Justinian give as an illustration the finding of precious stones on the seashore.[12] Moreover, French and Louisiana law provide that those who discover precious stones and other things of that kind on the seashore or other places where it is lawful to search for and take them, become masters of them.[13]

§632 (4) **Treasure trove** (**thesaurus**). When treasure is discovered which has been deposited in a place for so long a time that its ownership becomes unknown, this was considered in Roman law as treasure trove.[14] If discovered by the owner of the land in which it is found, the entire treasure belonged, according to a decision made by the Emperor Hadrian, to the owner of the land. But if the finder was not the owner of the land, then Hadrian decided that the finder could keep one-half of the treasure — the other half to go to the owner of the land.[15] These two solutions of the Roman law as to the awarding of treasure trove are also repeated in the modern

[8] *Inst.* 2, 1, 22.
[9] See supra vol. i, § 374.
[10] See Scrutton, *Roman law*, p. 145.
[11] Twiss, *Law of nations*, vol. i, ch. 7; Blackstone, vol. ii, p. 261.
[12] *Inst.* 2, 1, 18.
[13] *Civil code* of France, 717; Louisiana, 3420.
[14] *Dig.* 41, 1, 31, 1.
[15] *Inst.* 2, 1, 39.

law of France, Spain, Chile, Argentina, Louisiana, Porto Rico, and Japan.[16]

The English Common Law also was originally like the Roman: Blackstone, following Bracton, and noting that the latter uses "the words of the Civilians," [17] says that "formerly all treasure trove belonged to the finder: as was also the rule of the Civil Law." But with the growth of the power of the English Crown, arose the later and present Common Law rule of Tudor aspect, which is different from and more barbarous than the Roman. According to Lord Coke and Blackstone, all hidden treasure of gold and silver,[18] the owner of which is unknown, as well as waifs or estrays belong to the Crown — that is, the State.

§ 633 (5) **Res nullius.** In both Roman and modern law, things intentionally abandoned by their owners belong to the first finder or occupant.[19] The ownership of the original owner is regarded as extinguished. By the Louisiana Code it is similarly provided that "he who finds a thing which is abandoned, that is, which its owner has left with the intention not to keep it any longer, becomes master of it in the same manner as if it had never belonged to anybody." [20] The English Common Law also gives to the finder of property (treasure trove excepted) a good title.[21] Such things are called *bona vacantia*, the notion of which Blackstone, citing Bracton, ascribes to the Roman law.[22]

§ 634 (6) **Booty of war, or an enemy's property taken in war.** "All that is taken from the enemy becomes ours," declares the

[16] *Civil code* of France, 716; Spain 351; Chile, 626; Argentina, 2550, 2559, 2561–3; Porto Rico, 358; Japan, 241; Louisiana, 3423.

[17] Blackstone, p. 296.

[18] 2 Coke, *Inst.* 577; Blackstone, *Comm.* vol. ii, p. 409.

[19] *Dig.* 41, 1, 3, pr.

[20] Art. 3421.

[21] Stephen, *Commentaries*, vol. ii, book iv, pt. 1, ch. 7; Williams, *Inst. of Justinian* [2], p. 78. But the finder must, before appropriation, "take reasonable pains to discover the former owner, whose rights remain, unless they were designedly abandoned by him," — Stephen, *Id.*

[22] Blackstone, pp. 298–9. But if the property is land to which no title can be shown by a subject, or if it be property falling within the category of waifs or estrays, this property belongs to the Crown (State) by the rule *quod nullius est, fit domini regis.*

(§ 634) Roman jurist Gaius.[23] The enemy himself, his wife, and children, all human beings captured alive, all houses, lands, and movables formed, in Roman law, the prey of the captors.

Movables belonged either to the individual soldier capturing them, or were divided as spoil among his fellow soldiers.[24] According to English law, and ignoring international conventions, the goods of an alien enemy captured on land or sea belong to the State.[25] In modern times prisoners of war are no longer made slaves, but are frequently exchanged during a war and at its close are released.[26]

Immovables taken in war did not go, in Roman law, to the actual captors but were always reserved for the Roman State and formed part of the domain of public lands.[27] In English and other modern legal systems of law the Roman rule has survived to this extent: that all public property of an alien enemy belongs to the conquering State.[28] Private immovable property is now ordinarily treated as non-confiscable.[29]

[23] Gaius, 2, 69; repeated in *Inst.* 2, 1, 17.
[24] *Dig.* 41, 1, 51, 1; *Dig.* 49, 14, 31.
[25] Williams, *Inst. of Justinian* [2], 55, 61; 2 Twiss, *Law of nations*, ch. 4.
[26] See 2 Twiss, *Law of nations*, chap. 9.
[27] *Dig.* 49, 15, 20, 1.
[28] Williams, *Inst. of Justinian* [2], pp. 55, 61.
[29] Twiss, *Law of nations*, ch. 4, par. 17, note.

CHAPTER II

ACCESSION (ACCESSIO)

§635 **Accession defined.** In both Roman and modern law, accession occurs when a thing previously having an independent existence becomes an actual part of another thing. The Roman doctrine of accession was developed on this basis: that the accessory thing follows the fortune of the principal thing. The law of accession is but the defining of the principal and accessory things in each instance of accession.[1]

The Louisiana Civil Code succinctly restates as follows the Roman law definition of accession: "The ownership of a thing, whether it be movable or immovable, carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or artificially."[2] In regard to the English Common Law, Blackstone says that "these (Roman) doctrines (as to accession) are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts."[3]

§636 **Forms of accession:** (1) **fruits** (**fructus**). Various kinds of accession were developed by Roman law — the chief examples being fruits, addition of land to land, commixtion, confusion, adjunction, and specification. All of these are forms of accession recognized in modern law. The simplest kind of accession is fruits, which conception is very wide and includes not only *natural* but *industrial* and *civil* fruits.[4]

§637 (2) **Addition of land to land.** Imperceptible addition of land to land by the sea or a river is known as **alluvion** (*alluvio*).[5]

[1] See supra § 569. That accession is a modern law mode of acquiring ownership, see 2 Blackstone, p. 404; Robinson, *Elementary law*[2], § 153; *Civil code* of Spain, 353; France, 546; Louisiana, 498; California, 1000; Italy, 443; Germany, 946.

[2] Art. 498.

[3] Blackstone, vol. ii, p. 404.

[4] Supra § 569.

[5] Gaius, 2, 70; *Inst.* 2, 1, 20; *Dig.* 41, 1, 7, 1.

Alluvion or the addition of land by accretion is also a recognized form of accession in modern law, for instance the French-Spanish and Anglo-American.[6]

Alluvion was imported into the English Common Law by Bracton, who is cited as late as 1821 with approval, as to acquisition by alluvion, by Chief Justice Best in the House of Lords' case of *Gifford* v. *Lord Yarborough*.[7] In the American case of *St. Clair* v. *Lovingston*,[8] it was held by the United States Supreme Court in 1874 that a river bank includes whatever increment of land that may be added to it by alluvion. And the court in its decision endorses the doctrine of Roman law as to alluvion set forth in Institutes of Justinian,[9] which it cites with approval as bearing upon the case at bar.

A violent detachment of land by the action of water is known as **avulsion.**[10] It is recognized in Anglo-American law.[11] **An island formed in a river** (insula in flumine nata) is another instance of accretion of land to land.[12] Modern law, for instance the Anglo-American, is the same as the Roman in regard to a newly formed island in a river.[13] **A bed abandoned by a river** (alveus derelictus [14]) is still another example of accession of land to land; and it also is recognized in Anglo-American law.[15]

§ 638 (3) **Commixture of solids, or commixtion.**[16] This is the inseparable commingling of solid, homogeneous movables, for

[6] *Civil code* of France, 366; Spain, 366; Robinson, *Elementary law*[2], § 116.

[7] Law Reports, 1 Com. Pleas Div., 18, 29.

[8] 23 Wall. Rep. 46.

[9] *Inst.* 2, 1, 20.

[10] Gaius, 2, 71; *Inst.* 2, 1, 21; *Dig.* 41, 1, 7, 2.

[11] Robinson, *Elementary law*[2], § 116; Williams, *Inst. of Justinian*[2], p. 62.

[12] Gaius, 2, 72; *Inst.* 2, 1, 22; *Dig.* 41, 1, 7, 3.

[13] *Foster* v. *Wright*, L. R., 4 Excheq. 368; Williams, *Id.* p. 63.

[14] *Inst.* 2, 1, 22–4.

[15] Robinson, *El. law*[2], § 92; Williams, *Inst. of Just.*[2], p. 64.

[16] *Commixtio* is medieval Latin. But the Roman law uses "commixtum," (from which commixtion is derived) in the sense of commingling solids (see next footnote).

instance two piles of grain, belonging to different owners.[17] The compound is divided *pro rata* between the previous owners.[18]

(4) **Commixture of liquids, or confusion.**[19] This is the commingling of liquid movables belonging to different owners.[20] The compound, if inseparable, is owned in common by the previous owners[21]; but if the compound is separable, each retains and may recover his ownership of his part of the mingled property.[22] §639

(5) **Adjunction.** The form of accession known as adjunction[23] is of great importance. Adjunction, in both Roman and modern law, relates to various cases of things belonging to different owners which become united as principal and accessory objects. The principle of accession applies only when the union is indissoluble except with injury to both things; the rule then is that generally the less important is to be considered the accessory thing, and the more important the principal thing.[24] But the person ignorantly uniting another's property to his own must compensate the owner of the property so adjoined; but if he did this with evil intent, he is liable for theft.[25] §640

Inasmuch as adjunction may occur either by the addition of a movable to an immovable or by the union of two movables, instances of accession by adjunction are many. For example, the writing accedes to the parchment or paper; crops, trees, plants, shrubs accede to the soil; the canvas of a painting to

[17] *Inst.* 2, 1, 27–8. "Ejusdem naturae . . . commixtum": *Dig.* 6, 1, 3, 2.

[18] *Id.*; *Dig.* 6, 1, 5, pr.

[19] *Confusio*, in this sense is medieval Latin, although there is a Roman "confusio". But the Roman law uses "confusus" in the sense of commingling liquids (*Inst.* 2, 1, 27).

[20] *Inst.* 2, 1, 27; *Dig.* 41, 1, 7, §§8–9. "Ejusdem naturae . . . confusum": *Dig.* 6, 1, 3, 2. But accession by confusion occurs only when the mixture was made without the consent of one of the owners.

[21] *Id.*

[22] *Dig.* 6, 1, 5, 1; *Dig.* 6, 1, 3, 2.

[23] The word is derived from "adjunctio," which is used in Paulus *Sent.* 3, 6, 49, in a cognate but different sense of *addition*.

[24] Gaius, 2, 77–8; *Inst.* 2, 1, 33–4.

[25] *Id.*

the painting.[26] And if a person builds on the land of another, the building ordinarily belongs to the owner of the land.[27] However, if the owner of the land builds his house with the materials of another, he must compensate the latter for his materials.[28]

Finally, out of the adjunction of a movable with an immovable arose the law of **fixtures.** A tenant before he surrenders possession can remove all fixtures not permanently united to real property and the separation of which would not impair the value of the immovable.[29]

§ 641 (6) **Specification.**[30] This is the formation of a new article from the materials of another, by the addition of labor — as for instance wine from grapes, flour from wheat, a dish of gold or silver from these metals.[31] In this form of accession it has been finally settled that if the new article can be reduced without injury to the original material, then the material is the principal thing, and the labor of the workman is the accessory thing which must be paid for.[32] But if the new article can never be restored to its former condition, then the product is the principal thing and belongs to the workman, who must pay for the material (the accessory thing) if he took it in good faith thinking it was his own; but if he acted with evil intent the workman is liable for theft.[33]

[26] *Id.*

[27] Gaius, 2, 76; *Inst.* 2, 1, 30. The exception to the rule is a *superficies*, — supra § 609.

[28] *Inst.* 2, 1, 29.

[29] *Dig.* 19, 2, 19, 4.

[30] The word *specificatio* is medieval Latin and not Roman; the phrase *speciem facere* is used in Roman law (see *Inst.* 1, 2, 25).

[31] Gaius, 2, 79; *Inst.* 2, 1, 25.

[32] *Id.;* Mackeldey (Dropsie), *Roman law*[14], § 271.

[33] Gaius, 2, 79; *Inst.* 2, 1, 26; Mackeldey, *Id.*

CHAPTER III

DELIVERY[1] (TRADITIO)

Delivery or transfer defined. In both Roman and modern law, delivery as a mode of acquiring property consists in the transfer of the possession of a thing accompanied by a manifestation of intention to transfer the ownership of it.[2] The legal transaction or some fact expressive of the transferor's intention to transfer the ownership to the transferee — for instance, a contract, a gift — was called *justa causa* in Roman law.[3] §642

A mere delivery, in both Roman and modern law, is not enough to transfer ownership.[4] For delivery in itself is but a transfer of possession. This doctrine was transplanted into English law by Bracton, who emphasizes the necessity of a justa causa almost in the very words of the Digest of Justinian.[5] Moreover, a mere agreement to transfer ownership did

[1] This is the usual English translation: see *Civil code* of Louisiana, 2477 Quebec, 1492; Porto Rico, 1365; Spain, 1462 (Walton, transl.); France, 1604 (Wright); Sohm (Ledlie[3]), *Roman law*, p. 312; Hunter, *Roman law*[4], p. 282. But the best English translation of "traditio" is "*transfer*" (California Civil Code, 1000, 1039–1231). Another English translation of "traditio" is "*tradition*" (used in the Louisiana Civil Code, 2477, and by Morey, *Roman law*, p. 307). "Traditio" is translated in French by "*délivrance*" (Code, 1604), in Italian by "*tradizione*" (Code, 1463), and in Spanish by "*entrega*" (Code, 1462).

[2] ROMAN LAW: *Inst.* 2, 1, 40–41; *Dig.* 41, 1, 13, pr. MODERN LAW: Delivery is a mode of acquiring ownership recognized in modern law, for instance the Anglo-American, French, German, Italian, and Spanish: Robinson, *Elementary law*[2], §§129, 158; *Civil code* of California, 1000–1039, 1231; Louisiana, 2477, 870, 1910; France, 1136, 1264, 1604; Germany, 448; Italy, 710, 1125, 1463.

[3] Ulpian, *Reg.* 19, 2; *Dig.* 41, 1, 31, pr.; *Inst.* 2, 1, 41. It is sometimes called *justus titulus*. Although in Roman law no written document evidencing a delivery was necessary, it was the common practice to make such records: *Code*, 7, 32, 2; *Code*, 4, 38, 12.

[4] *Dig.* 41, 1, 31, pr.; and citations of second note above.

[5] See Scrutton, *Roman law*, p. 90.

not, in Roman law, effect a legal transfer of property[6] — it created only a right *in personam* against the party making the agreement; the intention to transfer ownership, which the agreement evidences, must always be accompanied by delivery — actual or constructive — of the possession of the property.[7]

§ 643 **Actual and constructive delivery distinguished. Cases of constructive delivery.** Actual delivery consists in the transfer of physical possession or detention.[8] But although Roman law finally made all kinds of property (movable or immovable) transferable by delivery,[9] it did *not* require that the delivery be corporeal in every case of acquiring ownership by transfer — in other words provision was made for constructive delivery of certain kinds of property. Constructive delivery is included by Bracton in his treatment of the subject of delivery in English law.[10]

In Roman law the forms of constructive delivery were as follows: 1. *Symbolical delivery.* This occurred when the transferor hands over to the transferee the means of taking possession of property, as for instance the keys to a house or building.[11] This illustration is also a case of symbolical

[6] "Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur": *Code*, 2, 3, 20.

[7] *Id.*

[8] See supra § 576.

[9] *Traditio* originally was the authorized mode of conveying that kind of property recognized by the praetorian law (*res nec mancipi*, — Gaius, 2, 18–19); and when *mancipatio* (that form of conveyance peculiar to the *jus civile*, supra § 569) became odious and fell into disuse because of its limitations and cumbersomeness, simple delivery was made to suffice for *all* kinds of property.

[10] See Scrutton, *Roman law*, p. 90. For Anglo-American authorities on constructive delivery see *Chaplin* v. *Rogers*, 1 East, 192; *Meyerstein* v. *Barber*, Law Rep., 2 C. P. 52; *Winslow* v. *Fletcher*, 53 Conn. 390; *Miller* v. *Lacey*, 7 Houst. (Deleware), 8; *Re Robson*, 2 Chan. (1891), 559.

[11] *Inst.* 2, 1, 45; *Dig.* 41, 1, 9, 6; *Dig.* 41, 2, 1, 21; *Dig.* 18, 1, 74. A gift and delivery of the title-deeds of slaves were held to result in the transfer of the slaves themselves to the donee (*Code*, 8, 53, 54, 1). Hunter regards this case as an extreme example of symbolical delivery; but Savigny declares that the text of the Code is incomplete and that the act was really a case of *traditio longa manu* (about to be explained): Hunter, *Roman law*[4], p. 282.

delivery in modern law.[12] For instance, it is provided in (§ 643)
Louisiana law that "the tradition or delivery of movable effects takes place either by their real tradition, or by the delivery of the keys of the buildings in which they are kept."[13] Says Lord Kenyon: "There need not be actual delivery but there may be something tantamount, such as the delivery to the buyer of a key of the warehouse in which the goods are lodged."[14]

2. *Traditio longa manu.*[15] This occurred when the grantor of land either takes his grantee on the land or shows it to him from a place where it can be seen, at the same time declaring to him that the possession is now his[16]; or when the transferor of a movable places the thing before the transferee, or on the transferee's order delivers it at his house.[17]

3. *Traditio brevi manu.*[18] This occurred when the transferee, prior to the sale, had already come into actual possession of the property sold, and then the transferor merely declares that the ownership now belongs to the transferee[19]; or when the transferee directs the transferor to deliver the property to somebody else, and the transferor does as directed.[20]

4. *Constitutium possessorium.* This occurred when the owner of a thing declares that he will hold the thing as possessor for another person, thus transferring his ownership to the latter.[21]

[12] Stephen, *Commentaries*, etc., vol. i, book ii, part i, ch. 17; *Chaplin* v. *Rogers*, 1 East, 192; *Civil code* of France, 1606; Italy, 1465; Louisiana, 2478; Mexico, 2851; Chile, 684; Spain, 1463; Porto Rico, 1366.

[13] *Civil code*, 2478.

[14] *Chaplin* v. *Rogers*, 1 East, 192.

[15] *Dig.* 46, 3, 79: "manu longa tradita." The phrase is more appropriate to movables, *Id.*

[16] *Dig.* 41, 2, frag. 18, § 2; frag. 1, § 21.

[17] *Dig.* 46, 3, 79; *Dig.* 41, 2, 18, 2.

[18] *Dig.* 23, 3, 43, 1: "brevi manu."

[19] *Dig.* 6, 2, 9, 1; *Dig.* 41, 1, 9, 5; *Inst.* 2, 1, 44; *Dig.* 12, 1, 9, 9; In this case there was no necessity for a return of the possession to the transferor and a redelivery of the property to the transferee.

[20] *Dig.* 12, 1, 15; *Dig.* 23, 3, 43, 1; *Dig.* 24, 1, 3, 12; *Dig.* 41, 2, 1, 21; *Dig.* 6, 2, 11, pr.

[21] *Code*, 8, 53 (54), const. 28; const. 35, § 5; *Dig.* 41, 2, 18, pr.; *Dig.* 6, 1, 77; Sohm (Ledlie[3]), *Roman law*, p. 312.

CHAPTER IV

ADJUDICATION (ADJUDICATIO)

§644 **Adjudication defined.** In both Roman and modern law, adjudication is a decree of court awarding ownership.[1] It is acquisition by operation of law. In Roman law, ownership could be adjudged either in an action for partition or for settling disputed boundaries.[2] In England and the United States it is now possible to make a partition of land by decree of court.[3] And the jurisdiction of Equity to settle boundaries was undoubtedly borrowed from the Roman proceeding of a similar nature.[4]

[1] ROMAN LAW: Ulpian, *Reg.* 19, 16; *Inst.* 4, 17, §§4–7; *Inst.* 4, 6, 20; *Code*, 3, 37, 3. But see *Dig.* 41, 3, 17; *Code*, 7, 60. MODERN LAW: Robinson, *Elementary law*[2], §§123, 151; Williams, *Inst. of Justinian*[2], pp. 236, 331; Terry, *Common Law*, §494; *Civil code* of Louisiana, 1289, 2616; France, 815; Italy, 681, 984; Spain, 400; Porto Rico, 407; Argentina, 2726; Chile, 2313; Germany, 741.

[2] Supra note immediately preceding (Roman law). The Roman actions for partition were *actio familiae erciscundae* (for the partition of an inheritance), *actio communi dividundo* (for the partition of common or joint property), *actio finium regundorum* (for settling boundaries).

[3] See Terry, *Common Law*, §494. As to the partition of personal property see Williams, *Inst. of Justinian*[2], p. 236.

[4] *Wake* v. *Conyers*, 2 White and Tudor L. C. (note).

CHAPTER V

PRESCRIPTION[1] (PRAESCRIPTIO, USUCAPIO)

Origin of the Roman term "prescription." From the way of pleading in a Roman lawsuit[2] the acquisition or extinction of a right by lapse of time arose the term "prescription": it was what was alleged — written first (*praescriptio*) — in the very beginning[3] of the commission[4] to the trial referee and before the statement of the plaintiff's claim. It thus indicated to the referee[5] that he was to try the preliminary allegation before he proceeded to the main issue.[6] There were many such *praescriptiones* pleadable by either the plaintiff or the defendant[7]: one of the most important was the *praescriptio* setting forth acquisition or extinction of a right by lapse of time.[8] Subsequently, by metonymy, this term of pleading served to denote the substantive right itself, which §645

[1] A part of this was published by the author in 21 Yale Law Journal, p. 147, Dec. 1911, under the title of "Acquisitive prescription — its world-wide uniformity," and is reprinted by permission.

[2] The *civil procedure* about to be mentioned is of the period of the Later Republic and the Early Empire (see supra § 416).

[3] "Prae-scriptio," — literally something "written first or before": Gaius, 4, 132. See infra "civil procedure (formulary)," § 848.

[4] That is, the "formula" or short decree of the praetor or other magistrate containing written instructions to the person or persons appointed to try the issues of a case.

[5] Called variously in Later Republican and Early Imperial Roman law "judex", "arbiter", "recuperator".

[6] If the praescriptio was found to be true, the suit was dismissed or suspended.

[7] Gaius, 4, 133. Those pleadable by the defendant were no longer in use in the time of Gaius. The best known *praescriptiones* were the *praescriptio prejudicii* (the suit ought not to have been brought at all — Gaius, 4, 133), and the *praescriptio fori* (the suit is not within the jurisdiction of the court — *Dig.* 2, 8, 7). Both of these exist in modern law, but under other names.

[8] This was technically known as *praescriptio temporis*, — a praescriptio possible for a defendant to plead.

was then likewise called "praescriptio," — whence the modern legal term "prescription".

§646 **Evolution of the Roman prescription.** The law of prescription passed through a very long period of development and change lasting about a thousand years. By the Law of the XII Tables defects in title were cured after lapse of time. This mode of civil acquisition was known as **usucapio.** It was open to citizens only,[9] and gave quiritary ownership.[10] But the praetorian law introduced another mode of acquiring ownership by lapse of time: this — called **possessio longi temporis**[11] — was available to protect the possessory title of any one not a citizen. It gave praetorian possession, but not full ownership (dominium[12]). At first it operated only by way of limitation of action, and thus as a defense to the possessor as against any one claiming the property. Subsequently it came to be regarded as a mode of natural acquisition[13] open to all men — non-citizens as well as citizens.

In the time of Justinian the distinctions between citizens and subjects and the different kinds of ownership had long been obsolete.[14] Usucapio and the praetorian possessio or praescriptio became consolidated under the general term of **praescriptio,**[15] — prescription as used in modern law. But the ancient term usucapio is sometimes used in the Justinian law to designate the acquisition of movables only.[16]

§647 **The two kinds of prescription: acquisitive and extinctive.** Roman law in its final development and also modern law recognize two sorts of prescription, acquisitive and extinctive.[17] The difference between the two is merely the effect of lapse

[9] They alone enjoyed the *jus civile:* supra vol. i, § 40.

[10] See supra § 573.

[11] Also called *praescriptio.* As to the praetorian law, see vol. i, §§ 41, 44.

[12] See supra § 578.

[13] By the jus naturale, as part of the jus gentium.

[14] Supra §§ 443, 573.

[15] *Code,* 7, 31; *Code,* 7, 39, 8.

[16] *Inst.* 2, 6, pr.

[17] The *Civil code* of Chile, 2492, 2498, 2514, sharply draws this distinction between the two kinds of prescription.

of time upon the right prescribed. Acquisitive prescription [18] is the acquisition of a right by lapse of time; extinctive prescription is the extinction of a right by lapse of time[19]. Extinctive prescription is not a mode of acquiring ownership, while acquisitive prescription is. Extinctive prescription is but a mode of extinguishing an obligation, and it is based on the principle of limitation of actions.

Acquisitive prescription defined. In both Roman and modern law, acquisitive prescription is the acquisition of a thing by possession thereof as if owner for the period of time fixed by law.[20] It is acquisition by operation of law: the courts then refuse to recognize the title of the old owner. The purpose of constituting prescription is to put an end to litigation.[21] § 648

The Louisiana Civil Code defines prescription to be "a manner of acquiring the ownership of property . . . by the effect of time and under the conditions regulated by law." [22] The Spanish Code thus defines prescription: "Ownership and other real rights are acquired by prescription in the manner and under the rules specified by law." [23] Although prescription was unknown to ancient Anglo-Saxon law,[24] yet such rudimentary notions of it as the English Common

[18] *Praescriptio acquisitiva:* Mackeldey (Kauffman), *Roman law* [12], p. 203, note; *Civil code* of Chile, 2492, 2498.

[19] *Praescriptio extinctiva:* Mackeldey (Kauffman), *Id.* pp. 203, 290; *Civil code* of Chile, 2514.

[20] ROMAN LAW: *Dig.* 41, 3, 3; Gaius, 2, 41–61; Ulpian, *Reg.* 19, 8; *Inst.* 2, 6; *Code*, 7, 26–40; *Nov.* 119, 7; *Nov.* 131, 6; *Cod. Theodos.* 4, 14; Paulus, *Sent.* 5, 2. MODERN LAW: Blackstone, *Commentaries*, vol. ii, pp. 195, 263; Robinson, *Elementary law* [2], § 119; *Civil code* of France, 2219 et seq.; Spain, 1940; Germany, 937; Italy, 2105; Portugal, 517; Austria, 1451; Mexico, 1079; Chile, 2498; Argentina, 3999; Louisiana, 3472; California, 1000; Switzerland, 661, 728; Japan, 162; Quebec, 2183.

[21] "Ut aliquis litium finis esset": *Dig.* 41, 10, 5. See Broom, *Legal maxims*, p. 695, note 3.

[22] Art. 3457, which literally translates the *Civil code* of France, 2219. The Italian, Mexican, and Chilean civil codes define prescription in practically the same way as the French: see *Civil code* of Italy, 2105; Mexico, 1059; Chile, 2492.

[23] *Civil code* of Porto Rico, 1831; Spain, 1930.

[24] Scrutton, *Roman law*, p. 49.

Law developed were introduced from the Roman law by Bracton.[25]

§ 649 **The two kinds of acquisitive prescription: ordinary and extraordinary.** There are two kinds of acquisitive prescription, ordinary[26] and extraordinary.[27] The most obvious distinction between the two is the period of time required by law for the completion of each prescription, — ordinary prescription being completed in 3, 10, or 20 years, while extraordinary prescription necessitates 30 or 40 years or is immemorial.

§ 650 **Requisites of every prescription: (1) prescriptible things.** Both kinds of acquisitive prescription, whether ordinary or extraordinary, have three common requisites; the property must be capable of being prescribed, there must be a continuous uninterrupted possession of the property for the period of time fixed by law, and there must be good faith.

The first requisite of every prescription is prescriptible property.[28] 1. *The general rule.* Things not susceptible to private ownership[29] are absolutely incapable of acquisition by prescription either in Roman or in modern law.[30] The following excerpts from the modern codes are illustrative. "A

[25] *Id.* p. 91, 92; Güterbock, *Bracton*, p. 118.

[26] The terms "ordinary" and "extraordinary" are used in the *Civil code* of Chile, 2506. Ordinary prescription was known in Roman law as "praescriptio," or "usucapio" (in the ante-Justinian law; usucapio in the Justinian law refers to prescription of movables only), or "possessio longi temporis" (in the ante-Justinian law).

[27] Known in Roman law as "praescriptio XXX vel XL annis," or "praescriptio longissimi temporis," or "praescriptio immemorialis."

[28] *Res habiles:* Mackeldey (Dropsie), *Roman law*[14], § 288. It was possible in Roman law for a person to acquire by adverse possession leading to prescription any property which he had conveyed to another to secure a debt (see supra § 613 "fiducia"), this kind of prescription being called *usureceptio:* Gaius, 2, 59–60.

[29] *Res extra commercium*, — withdrawn from commerce: see supra § 614.

[30] ROMAN LAW: *Inst.* 2, 6, 1; *Dig.* 41, 3, 9. MODERN LAW: *Civil code* of Austria, 1455; Spain, 1936; Porto Rico, 1837; France, 2226, 714; Louisiana, 3479, 3497; Quebec, 2201; Mexico, 1061; Chile, 2498; Italy, 2113. Things *extra commercium* are tacitly recognized in Anglo-American and German law: see Blackstone, *Comm.* vol. ii, pp. 14, 263; Robinson, *El. law*[2], §§ 43, 119–20; Schuster, *Prin. of German law*, pp. 59–60.

title by prescription cannot be acquired to property which is (§ 650)
not capable of private ownership."[31] "Only the things . . . which are 'in commerce' can be prescribed."[32] "All things which are in commerce are susceptible of prescription."[33] "All things which are the object of commerce are capable of prescription."[34]

2. *Property exempted from prescription.* But there may be things which, although susceptible of ownership, are by law temporarily withdrawn from the operation of prescription.[35] Prescription here is often said to be suspended.[36] The following are made exempt from prescription: dotal property during marriage,[37] and property of wards and minors during their guardianship.[38] But these exemptions are not absolute: ownership of even such exempted property can be acquired by prescriptive possession for 30 or 40 years.[39]

And yet the running of prescription is suspended absolutely in one case — stolen things. Stolen things[40] and property taken possession of by violence[41] can never be acquired by adverse possession by the thief or wrongful ejector, who is forever barred from obtaining a prescriptive title no matter

[31] *Civil code* of France, 226 (Wright).

[32] *Id.*, Mexico, 1061 (Taylor).

[33] *Id.*, Spain, 1936 (Walton).

[34] *Id.*, Porto Rico, 1837.

[35] *Res inhabiles.*

[36] ROMAN LAW: *Code*, 5, 12, 30; *Code*, 7, 40, 1, § 2; *Code*, 7, 39, 7, 4a; Mackeldey (Dropsie) *Roman law*[14], § 288. MODERN LAW: *Civil code* of Chile, 2509; France, 2252; Louisiana, 3521–7; Germany, 202–5; Italy, 2119–20; Mexico, 1119–26.

[37] ROMAN LAW: *Code*, 5, 12, 30. MODERN LAW: *Civil code* of Mexico, 1116; Louisiana, 3524–5; Italy, 2120; France, 2255–6; Germany, 204; Chile, 2509; Argentina, 3970; Japan, 159; Switzerland (*code of obligations*), 134.

[38] ROMAN LAW: *Code*, 7, 35, 3. MODERN LAW: *Civil code* of Austria, 1494; Mexico, 1115; Louisiana, 3522; France, 2252; Italy, 2120; Germany, 204; Chile, 2509; Argentina, 3966; Japan, 159; Switzerland (*code of obligations*), 134.

[39] See infra § 655; Sohm (Ledlie[3]), *Roman law*, p. 321.

[40] Provision of the Roman law of the XII Tables: see *Inst.* 2, 6, 2.

[41] Provision of the *lex Julia et Plautia:* see *Inst.* 2, 6, 2.

how long is their possession.[42] For their possession was acquired *mala fide*, and will forever remain so. But a restoration of the property to the possession of the owner purges it of its taint, and makes it again capable of prescription.[43]

A third party obtaining the property in good faith from the thief or wrongful ejector was not disqualified from acquiring it by prescription.[44] And the law of England also favors a *bona fide* purchaser of stolen goods, who buys them prior to the thief's conviction.[45]

§ 651 **Requisites of every prescription: (2) continuous uninterrupted possession.** Another requisite of every prescription in both Roman and modern law is a continuous, uninterrupted possession of the property for the period of time fixed by law.[46] There are two ways of interrupting a prescription[47]: natural interruption or actual loss of the possession, and legal interruption or the bringing of a suit against the possessor's right. Both ways of interruption are recognized in modern as well as in Roman law.[48]

In both Roman and modern law the person intending to prescribe the property can, to complete the period of pre-

[42] ROMAN LAW: *Inst.* 2, 6, §§ 2–4, 8; Gaius, 2, §§ 45, 49; *Dig.* 41, 3, 4, §§ 6–27; Sohm (Ledlie[3]), *Roman law*, p. 321. Not even the longest prescription known to the Roman law — the *extraordinary* — was available. MODERN LAW: *Civil code* of Spain, 1956; France, 2279; Italy, 2146; Mexico, 1090; Austria, 1464; Portugal, 553.

[43] *Dig.* 41, 3, 4, 6; *Dig.* 50, 16, 215; *Inst.* 2, 6, 8.

[44] Sohm (Ledlie[3]), *Roman law*, p. 321.

[45] Purchased in "market overt." See 24 and 25 Vict. ch. 96, § 100; Williams, *Inst. of Justinian*[2], p. 103. After the thief is convicted, the bona fide purchaser may have to return the property to its owner.

[46] ROMAN LAW: *Dig.* 41, 3, 25. MODERN LAW: *Civil code* of Louisiana, 3487, 3500, 3506; France, 2229; Germany, 937; Italy, 2106; Portugal, 517; Chile, 2507; Argentina, 3948; Mexico, 1079; Austria,1460; Quebec, 2193; Japan, 162; Switzerland, 661; Robinson, *El. law*[2], §§ 119–20 (Anglo-American law).

[47] *Usurpatio* was the technical name for interruption of prescription: "usurpatio est usucapionis interruptio" (*Dig.* 41, 3, 2).

[48] ROMAN LAW: *Dig.* 41, 3, 2 and 5: *Code*, 7, 32, 10; *Code*, 7, 40, 2 and 3; *Code*, 7, 33, 1; *Dig.* 44, 3, 10. MODERN LAW: *Civil code* of Louisiana, 3516–18; France, 2242–6; Italy, 2123–5; Chile, 2501–3; Germany, 940–41; Spain, 1944–5; Mexico, 1117; Robinson, *El. law*[2], §§ 119–20 (Anglo-American law).

scription, add together all the times of possession of other persons in privity with him — such as that of a decedent from whom he inherited or that of the person selling to him.[49] The period of prescription is held to be completed at the end of its last day in Roman, French, Spanish, German, Italian, Mexican, and Japanese law.[50]

Requisites of every prescription: (3) good faith. The last requisite of every prescription in both Roman and modern law is good faith[51] on the part of the possessor.[52] To possess by force, or secretly, or upon sufferance is not possession in good faith.[53] In other words the possession must be peaceable, and open or public.[54] So too in English and American law, user which is by sufferance or secret will not establish a prescriptive right.[55] §652

Moreover, Roman law required that the party who prescribes must begin in good faith his possession.[56] But here English

[49] ROMAN LAW: *Inst.* 2, 6, §§12–14; *Dig.* 44, 3. MODERN LAW: *Civil code* of Louisiana, 3493–6; France, 2235; Spain, 1960; Porto Rico, 1861; Austria, 1493; Mexico, 1077; Germany, 943–4; Chile, 2500; Robinson, *El law*[2], §§ 119–20 (Anglo-Am. law).

[50] ROMAN LAW: "Totum postremum diem,"—*Dig.* 41, 3, 6. MODERN LAW: *Civil code* of France, 2261; Germany, 188; Italy, 2134; Spain, 1960; Mexico, 1129; Japan, 141.

[51] *Bona fides.* The *good conscience*, on which equity in Anglo-American law acts, very closely resembles the Roman "bona fides": Spence, *Equity* vol. i, p. 411.

[52] ROMAN LAW: *Inst.* 2, 6, pr.; Mackeldey (Dropsie), *Roman law*[14], § 287. MODERN LAW: *Civil code* of Louisiana, 3479, 3506; France, 2265; Italy, 2136; Spain, 1955, 1957; Porto Rico, 1856, 1858; Anglo-American law— Robinson, *El. law*[2] §§ 119–20 (it must be "peaceable," "notorious").

[53] "Nec vi, nec clam, nec precario . . . possides". *Dig.* 43, 17, 1, 5. This was originally a provision of the praetor's edict.

[54] See Markby, *Elements of law*[5], § 583: the English words "peaceable" and "open" are regarded as equivalent to the Roman "nec vi," and "nec clam."

[55] *Smith* v. *Miller*, 11 Gray (Mass.), 145; *Perrin* v. *Garfield*, 37 Vt. 304; *Carger* v. *Fee*, 140 Ind. 572; *Wiseman* v. *Lucksinger*, 84 N. Y. 31; *Cronkhite* v. *Same*, 94 N. Y. 323; *Johnson* v. *Skillman*, 29 Minn. 95; *Colchester* v. *Roberts*, 4 Mees. and W. 769; *Cook* v. *Gammon*, 93 Georgia 118; *Daniel* v. *North*, 11 East, 372.

[56] *Dig.* 41, 4, frag. 7, § 4; frag. 2, §§ 13 and also pr.; *Dig.* 41, 3, 15, 2. But the Canon Law required him to have been in good faith the entire period of prescription: "unde oportet, ut qui praescribit, in nulla temporis parte rei habeat conscientiam alienae" (cap. 5 and 20, *Extra*, 2, 26).

law apparently differs from the Roman: the possession need not originate *bona fide*.[57] And yet this difference is not, after all, so very real: cases in Roman law where the usual kinds of prescription are not available admit of the rare immemorial prescription,[58] and a possession begun *mala fide* can serve as a basis for a perpetual usage or exercise of a right.

§653 **Special requisites of ordinary prescription: (1) good title.** In addition to the general requisites of every prescription (prescriptible property, uninterrupted possession and good faith) ordinary prescription had some special requisites: these were good title[59] and time.[60]

In both Roman and modern law no ordinary prescription can take place unless there was at its inception a just or sufficient cause — for example a sale, gift, exchange — of transferring the property to the possessor.[61] In other words, the prescriptive claimant must have acquired possession in a lawful manner and must hold the property as his own. That modern law is the same as the Roman will be seen from the following excerpts. There must be a "just title"[62]; "a title sufficient to transfer ownership"[63]; "a title legal and sufficient to transfer property, . . . a title . . . received from any person . . . honestly believed to be the real owner, provided the title were such as to transfer ownership"[64]; "an instrument which is on the face of it capable of giving a title"[65]; "that which is fundamentally believed to be sufficient to transfer ownership"[66]; "a title which would have sufficed for the acquisition of the property"[67]; "possession as if owner"[68]; "a belief of ownership"[69]; a claim to be the owner."[70]

[57] Williams, *Inst. of Justinian*[2], p. 100; Markby, *Elements of law*[5], § 582. Markby severely criticizes an English decision holding that the commencement of possession must be "bona fide," i.e. peaceable and open.

[58] See Mackeldey (Kauffman), *Roman law*[12], § 283.

[59] *Justus titulus, justa causa.*

[60] *Tempus.*

[61] *Dig.* 41, 3, 27; *Code*, 3, 32, 24; *Code*, 7, 14, 6.

[62] *Civil code* of Spain, 1940; Louisiana, 3483; Mexico, 1079.

[63] *Id.*, Spain, 1952.

[64] *Id.*, Louisiana, 3479, 3484, 3483.

[65] *Id.*, France, 2265.

[66] *Id.*, Mexico, 1080.

[67] *Id.*, Austria, 1461.

[68] *Id.*, Germany, 900, 937; Japan, 162 (Lönholm).

[69] *Id.*, Spain, 1941.

[70] Anglo-American law — Robinson, *El. law*[2], § 120.

In one detail English law seems different from the Roman: although by English law as well as by Roman the enjoyment of possession must be "of right," yet in English law it need not originate "of right." [71] But this constitutes no substantial difference: even in Roman law, although an inception "not of right" would not lead to ordinary prescription, it should not be overlooked that it would serve as a basis for the extraordinary prescription of 30 years.[72]

Special requisites of ordinary prescription: (2) time. The other special requisite of ordinary prescription is the period of time fixed by law. In Roman law this term was 3 years for movables [73] and 10 or 20 years for immovable property.[74] If the parties lived in the same province, the prescriptive period was 10 years [75]; if the parties lived in different provinces, the prescriptive period was 20 years.[76] And this Roman extension of 10 years more to absent persons has also descended into many modern legal systems.[77] § 654

These Roman periods of 3 years for movables and 10 or 20 years for immovables have survived in the majority of the modern legal systems, although a few countries do not

[71] Williams, *Inst. of Justinian* [2], p. 100; Markby, *Elements of law* [5], § 582. Markby criticizes severely an English decision holding that the commencement of prescription must be "of right"; and he instances that a prescription may commence in trespass.

[72] See infra § 655.

[73] *Inst.* 2, 6, pr.; *Code*, 7, 31, 2. This was a Justinianean prescriptive period of time, and it was still referred to under the old familiar name of *usucapio*.

[74] *Inst.* 2, 6, pr.; *Code*, 7, 33, 12; *Code*, 7, 31; *Nov.* 119, ch. 7. This was a Justinianean prescriptive period of time. Incorporeal things were treated as immovables, — Hunter, *Roman law* [4], p. 419.

[75] "Inter praesentes": *Code*, 7, 33, 12.

[76] "Inter absentes": *Code*, id.

[77] For the purpose of prescription, "domicil in the same State" or "domicil in a foreign State" is almost always the equivalent of the Roman domicil in the same or different provinces: see the *Civil code* of Spain, 1957, 1958; Porto Rico, 1858, 1859; Chile, 2508. But in France (*Civil code*, 2266) there is a distinction, like the Roman in principle, between persons domiciled in or out of the "district" (*ressort*); and in Austria (*Civil code*, 1474) there is retained the Roman distinction between absence or presence from or in a "province".

retain all three periods. The prescriptive periods in France, Spain, Austria, Italy, Louisiana, Quebec, Mexico, and Japan are the same as the Roman periods of time.[78] By statute in England 20 years is the period of prescription for certain incorporeal hereditaments, as for instance an easement of light.[79] And this is also a common period in the United States.[80]

§655 **Special requisite of extraordinary prescription: time.** In addition to the general requisites of every prescription (prescriptible property, uninterrupted possession, and good faith), extraordinary prescription had the following special requisite: the period of time was 30 years (ordinarily) or 40 years (occasionally[81]). At the expiration of this term the property was acquired by prescription. Defective titles were cured, and things exempted from ordinary prescription were acquired, by this lengthy extraordinary prescription.[82]

The Roman period of 30 years still survives in the law of numerous modern countries: for instance France, Germany, Italy, Spain, Austria, Chile, Quebec, and Louisiana.[83] In the law of England, by statute the period of 30 years suffices for acquiring certain *profits à prendre*[84] (a form of incorporeal hereditaments). The occasional Roman term of 40 years is also a prescriptive period in Austrian law.[85] By statute in

[78] *Civil code* of France, 2279, 2265 (three, ten, and twenty); Spain, 1955; 1957 (three, ten, and twenty); Porto Rico, 1856, 1858 (three, ten, and twenty); Italy, 2140, 2135, 2137 (three, ten, and twenty); Japan, 162, 163 (ten and twenty); Quebec, 2258, 2268 (three and ten): Austria, 1466; Louisiana, 3538, 3544 (three and ten); Mexico, 1086, 1088 (three, ten, and twenty).

[79] See 2 and 3 William IV, ch. 71; Williams, *Inst. of Justinian*[2], p. 99.

[80] *Sibley* v. *Ellis*, 11 Gray (Mass.), 417; *Cruger* v. *Fee*, 140 Ind. 572.

[81] *Code*, 7, 39, 8, 1; *Code*, 7, 31; *Nov.* 119, ch. 7. These were Justinianean prescriptive periods of time.

[82] See supra § 650; Mackeldey (Dropsie), *Roman law*[14], § 291; Sohm (Ledlie[3]), *Roman law*, p. 321.

[83] *Civil code* of France, 2262; Louisiana, 3548; Spain, 1959; Porto Rico, 1860; Chile, 2510; Italy, 2135; Germany, 195; Quebec, 2265; Austria, 1470, 1480, 1478, 1468, 1477.

[84] 2 and 3 William IV, ch. 71; Williams, *Inst. of Justinian*[2], p. 99.

[85] *Civil code* of Austria, 1474, 1477.

England 40 years is the prescriptive period for acquiring certain easements.[86]

Immemorial prescription. There was in Roman law a very rare variety of extraordinary prescription, namely immemorial prescription.[87] Its basis is this principle: that if anyone uninterruptedly possessed a thing or right beyond the memory of man, he should be regarded as its lawful owner or holder. Hence it was a kind of subsidiary prescription where ordinary or extraordinary prescription would not be available; and it was proved by witnesses who might qualify either by what they had seen themselves or heard from their ancestors. The prescriptive claimant had to prove a perpetual usage or exercise of a right. §656

Immemorial prescription has been borrowed from the Roman by the Canon Law[88]; and in this way its principles have made an impression on English law. Here is an interesting English blend of the Roman 20-year and immemorial prescriptions: in the English Common Law, hereditaments are acquired by usage from time immemorial; but, according to Stephen and other authorities, enjoyment for 20 years raises a presumption that it is immemorial.[89]

[86] 2 and 3 William IV, ch. 71; Williams, *Inst. of Justinian*[2], p. 99.

[87] The term *praescriptio immemorialis* (or *indefinita*, as was also a later usage) is not to be found in the Roman law texts, but was first employed by the Glossators (supra, vol. i, §231): see Mackeldey (Kauffman), *Roman law*[12], §283, p. 300, note; Savigny, *System*, vol. iv, §§195 et seq., (on *tempus*, *possessio*, or *praescriptio immemorialis*). Nevertheless there are expressions in the Corpus Juris, which refer to immemorial prescription: for instance "cujus origo memoriam excessit" (*Dig.* 43, 20, 3, 4); "vetustas, quae semper pro lege habetur" (*Dig.* 39, 3, 2, pr.); "nec memoriam extare, quando facta est" (*Id.*, frag. 2, §1): "quorum memoriam vetustas excedit" (*Id.*, frag. 2, §3); "sive extet fossae memoria, sive non extet." (*Id.*, frag. 2, §4); "neque memoria extat . . . etiam si memoria ejus non extet" (*Id.*, frag. 2, §5); "an memoria extet facto opere" (*Id.*, frag. 2, §8); "quibus auctoritatem vetustas daret" (*Id.*, frag. 26).

[88] "Ex antiquo consuetudine a tempore, cujus non extat memoria, introducta": cap. 26, *Extra*, 5, 40.

[89] Stephen, *Commentaries, etc.*, vol. i, book ii, pt. i, ch. 33; Williams, *Inst. of Justinian*[2], p. 99; Hopkins, *Real property*, p. 352, notes 23 and 24.

CHAPTER VI

GIFT[1] (DONATIO)

§ 657 **Gift defined.** In both Roman and modern law, a gift is a voluntary act by which a person disposes of a part of his property without payment or gratuitously in favor of another who accepts it.[2] Gifts are of two kinds: *inter vivos* (between living persons), and *mortis causa* (in expectation of death[3]). Both kinds of gifts have a common requisite: there must be a delivery[4] of the property to the donee or recipient of the gift.

§ 658 **Gifts inter vivos.** In both Roman and modern law, a gift between living persons concerns the present and is essentially irrevocable.[5] But to this rule there were, in Roman law, some exceptions. 1. The donor could revoke or dissolve a gift on account of the donee's *ingratitude* — such as attempting to take the donor's life, or severely injuring him, or causing him a loss of property.[6] Ingratitude, in the Roman sense, is also

[1] "*Donation*" is the word used in the Louisiana Civil Code, 1476 et seq.

[2] ROMAN LAW: *Dig.* 39, 5, 29, pr.; *Dig.* 50, 17, 82; *Dig.* 39, 5, 1, pr.; *Dig.* 39, 6, 35, 1; *Dig.* 50, 16, 214; *Dig.* 50, 16, 67, 1; *Inst.* 2, 7, 1. MODERN LAW: *Civil code* of California, 1146; Porto Rico, 625; Spain, 618; Chile, 1386; Germany, 516; Japan, 549; France, 894; Louisiana, 1468; Italy, 1050; Robinson, *Elementary law*[2], § 156 (Anglo-American law).

[3] *Inst.* 2, 7, 1; the immediately preceding footnote; infra vol. iii, § 999.

[4] See supra § 643. Justinian, probably influenced by the clergy who hoped to encourage gifts to themselves and for pious uses, enacted that a promise to make a gift should be enforceable by an action at law (*Inst.* 2, 7, 2; *Code*, 8, 54 (53) 35, 5b; see *Code Theod.* 8, 12, 4). This was an extension of a decision of Antoninus Pius who enforced such a promise as between parent and child. (*Frag. Vat.* 314.)

[5] ROMAN LAW: *Inst.* 2, 7, 2. MODERN LAW: Robinson, *Elementary law*[2], § 156; *Stark* v. *Kelly*, 113 S. W. Reporter, 500; 20 *Am. cyc. of law*, 1211; *Civil code* of Austria, 946; Mexico, 2601. **Gifts between husband and wife,** which are also gifts *inter vivos*, have already been considered: see supra §§ 477–9; infra vol. iii, § 988.

[6] *Code*, 8, 55 (56), const. 10 (Justinian). It is really a generalization of *Code*, 8, 55, 7, enacted a century earlier by Theodosius II and Valentinian III.

a cause of revocation in the modern law of some countries, for instance France, Germany, Italy, Spain, Austria, Louisiana, Argentina, Chile, and Mexico.[7]

2. The donor could revoke a gift on account of the donee's non-performance of the conditions attached to the gift. Revocation on this ground exists also in many modern systems of law.[8] 3. A gift made by a childless donor was revocable by subsequent birth of a child.[9] This is true also in the law of many modern countries.[10] 4. A gift was revocable if it exceeded the disposable part (pars legitima) of the donor's property, or that portion of his property which he must leave by law to his descendants or ascendants.[11] Revocation on this ground is allowed in some modern legal systems.[12]

The Roman policy as to gifts inter vivos. The Later Imperial and Justinianean system of recording (insinuatio). § 659 In Ancient Roman law, gifts inter vivos were not restricted in any manner. But in course of time this original freedom was impaired, for the Romans came to regard gifts unfavorably. And in the year 204 B.C. a law, known as the lex Cincia,[13] was passed to restrain excessive gifts. This statute

[7] *Civil code* of France, 953; Germany, 530; Italy, 1081; Spain, 648; Austria, 948; Porto Rico, 656; Louisiana, 1559; Argentina, 1892; Chile, 1428; Mexico, 2646.

[8] *Civil code* of France, 953; Louisiana, 1559; Italy, 1080; Germany, 530; Spain, 647; Porto Rico, 655; Chile, 1426; Argentina, 1884.

[9] *Code*, 8, 55 (56), 8; see *Code*, 3, 29, 5. This Roman rule, although apparently limited to gifts made to emancipated children, probably was extended by usage made to other persons: Savigny, *System*, vol. iv, pp. 229 et seq.

[10] *Civil code* of France, 960; Italy, 1083; Spain, 644; Porto Rico, 652; Austria, 954; Mexico, 2634; see Chile, 1424; Argentina, 1902.

[11] *Dig.* 31, 87, §§ 3–4. See *Code*, 3, 29; *Cod. Theod.* 2, 20. Such gift was called an "inofficiosa donatio." See supra § 464, and infra "testate succession," § 697.

[12] *Civil code* of Austria, 951; Mexico, 2615, 2651.

[13] The *lex Cincia de donis et muneribus* was a plebiscitum introduced by the tribune Marcus Cincius Alimentus: Cicero, *De or.*, 2, 71; *De senect.*, 4, 10. One of the provisions of this statute prohibited lawyers from receiving fees for their services, — Tacitus, *Annales*, 11, 5. As to the provisions of lex Cincia relative to checking excessive gifts, see *Vat. Frag.* 259–316.

(§ 659) prohibited gifts exceeding a certain amount,[14] unless made to relatives and a few other excepted persons.[15] And this prohibition continued in force during the rest of the Republican era and also during the Early Empire.[16]

But early in the 5th century this ancient restrictive policy as to gifts inter vivos began to be replaced by the introduction of a new and better institution, which, by making publicity necessary, raised a strong obstacle against both excessive and clandestine gifts. This system was the obligatory recording of gifts in a public registry. It was known as *insinuatio*.[17] This formality is mentioned for the first time in an edict of Constantine the Great.[18] This system of recording gifts as

[14] What this amount was is no longer known. That not only the excess beyond the amount specified by law (*ultra modum*) was void, but also the entire gift was void, is disputed. Petit, *Droit romain*, § 421, holds that the entire gift (both the excess and also the amount of the gift below the limit) was void, arguing from *Vat. Frag.* 266. Girard and Hunter hold that only the excess was void, — such is their interpretation of *Vat. Frag.* 266, and Ulpian, *Reg.* 1; Paulus, *Sent.* 5, 11, 6: see Girard, *Manuel*[5], p. 938, note 3; Hunter, *Roman law*[4], p. 319. The opinion of Petit is more in accordance with the illiberal spirit of Republican and Early Imperial civil procedure.

[15] For a list of the excepted persons, see *Vat. Frag.* 298–316. Gifts between near relatives, husband and wife (see supra § 477), and from guardian to ward, were unrestricted in amount.

[16] See *Vat. Frag.* 312, which shows that the lex Cincia was in force in the time of Diocletian (reigned A.D. 284–305). Although this old Republican statute had fallen into desuetude long before Justinian, nevertheless he took the precaution to abolish all lingering traces of this ancient statute, see *Nov.* 162, 1.

[17] The purpose of this formality, already employed for other acts, was to secure authentication or proof of the existence of a document from some official authority having the *jus acta conficiendi* which belonged to all courts and especially to municipal magistrates. Insinuatio became effective by reading and copying (*recitatio*, *professio*) the document on the registries of the clerk's office. See Girard, *Manuel de droit romain*[5], p. 942, note 3. Very frequently the writing evidencing the gift was made by a notary (*tabellio*, *notarius*).

[18] *Vat. Frag.* 249 (A.D. 316). Its introduction is attributed by the same emperor to his father Constantius Chlorus: *Cod. Theod.* 3, 5, 1. But the insinuatio of documents was actually employed in practice much earlier: the "professio donationis apud acta" is mentioned in A.D. 229 in a statute of Alexander Severus (*Vat. Frag.* 266).

established by Constantine [19] was continued during the Later Empire. (§ 659)

Although Constantine required that all gifts, irrespective of amount, must be recorded in order to be valid,[20] a century later the registration of gifts *ante nuptias* below a certain amount was dispensed with.[21] Justinian extended this exemption to *all* gifts, and then raised the limit twice, finally fixing it at 500 *solidi* (about $1200 [22]); furthermore, he provided that if a gift exceeding this amount was not recorded, it should be void only for the excess.[23] Still later Justinian enacted that certain gifts, among them the gift on account of marriage,[24] need not be recorded at all.[25]

The system of insinuatio lasted long after Justinian in the Eastern Roman Empire, and it did not disappear until during the reign of Leo VI (A.D. 886–912).[26] It is interesting to note that in modern Chilean law gifts beyond a specified amount are subject to a formality reminiscent of the Roman insinuatio, and that gifts made without such publicity are void as to the excess over the limit prescribed by law.[27] Traces of the Roman

[19] *Cod. Theod.* 8, 12, 1 and 3; *Frag. Vat.* 249.

[20] *Cod. Theod.* 8, 12, 1 and 3; *Cod. Theod.* 3, 5, 1; *Code Justinian*, 8, 53 (54), 25.

[21] Gifts under 200 *solidi* were exempted: *Cod. Theod.* 3, 5, 13 (Theodosius II and Valentinian III). As to gifts *ante nuptias*, see supra § 479.

[22] He first raised it to 300 *solidi* (Code, 8, 53 (54), 34, pr.), and then to 500 *solidi* (*Code*, 8, 53 (54), 36, 3; *Inst.* 2, 7, 2).

[23] *Code*, 8, 53 (54), 34, 1. See also *Nov.* 52, ch. 2; *Nov.* 162, ch. 1, *Code*, 5, 12, 3; *Code*, 5, 3, 17.

[24] Discussed supra § 479.

[25] 1. *Donatio propter nuptias: Nov.* 119, 1; see also *Code*, 5, 3, 20, 8 (1); *Code*, 5, 16, 25; *Nov.* 162, 1. But omission of the registration might damage the husband, although not harming the wife (*Nov.* 127, 2). 2. *Other gifts* are enumerated in *Code*, 8, 53 (54), const. 36, pr. and § 2; const. 34, 1a; *Nov.* 52, 2. But generally gifts for pious uses must be recorded (*Code*, 1, 2, 19).

[26] Monnier, *Études, etc.*, Nouvelle revue historique, (1895) p. 86; and *Méditation sur la loi, etc.*, p. 159, Paris, 1900; see Villaneuva, *Dritto Bizantino*, (1906), p. 135. But Zachariae, *Geschichte der griechisch. röm. Rechts* [3] (1892), p. 305, declares (erroneously) that insinuatio had disappeared nearly two centuries earlier, — by the time of Leo the Isaurian.

[27] *Civil code* of Chile, 1401. The limit is 2000 pesos. See *Civil code* of Mexico, 2607 et seq.

requirement of publicity for gifts are to be found also in modern French, Italian, and Louisiana law, which require that the form of a gift inter vivos shall be by a public act passed before a notary and witnesses.[28]

§ 660 **Gifts mortis causa.** In both Roman and modern law a gift in expectation of death concerns the future, and it is essentially revocable by the donor if he survives the anticipated peril or if the donee dies first.[29] That the English Common Law gift mortis causa has a Roman origin is frankly acknowledged by Blackstone.[30]

Moreover, a gift in expectation of death must not exceed the disposable part (pars legitima) of the donor's property.[31] In Roman law the same formalities were required for a gift *mortis causa* as for a gift *inter vivos*,[32] except that Justinian did not require registration of gifts *mortis causa* exceeding the amount fixed by law, provided these were attested by five witnesses.[33]

Because gifts in expectation of death resemble legacies[34] in that the beneficiary obtains no vested right until the death of the donor, Justinian completed the Roman movement for putting gifts mortis causa on the same footing with legacies,[35]

[28] *Civil code* of France, 931; Italy, 1056; Louisiana, 1536. Furthermore, if the gift embraces property that may legally be mortgaged, it must always be recorded in a public registry for mortgages (and this is true also in Spanish and Chilean law): *Civil code* of France, 939; Louisiana, 1554; Spain, 633; Chile, 1400.

[29] ROMAN LAW: *Inst.* 2, 7, 1; *Dig.* 16, 3, 26, pr.; *Dig.* 39, 6, 2–7; see *Dig.* 39, 6, 18. MODERN LAW: Robinson, *Elementary law*[2], § 156; see *Ward* v. *Turner*, 2 Ves. Sen. 431.

[30] *Comm.*, vol. ii, p. 514.

[31] *Dig.* 5, 2, 8, 6. *Pars legitima* is defined supra § 658, and infra § 697.

[32] *Vat. Frag.* 249: *Cod. Theod.* 8, 12, 1; *Code Justinian*, 8, 53 (54), 25; and see supra § 659. Gifts mortis causa were permitted between husband and wife: *Dig.* 24, 1, frag. 9, § 2; frag. 10.

[33] *Code*, 8, 56 (57), 4. But if not executed before witnesses, like a codicil, probably such gifts had to be recorded. Codicils are discussed infra § 714.

[34] The one essential difference is that a gift *mortis causa*, unlike a legacy, does not depend upon the fate of a will. Legacies are considered infra § 706.

[35] *Inst.* 2, 7, 1; Code, 8, 56 (57), 4. See *Dig.* 39, 6, 37, pr., for an earlier similar attitude by the jurist Ulpian.

applying to them as far as possible the rules governing legacies.[36] For instance, the rule that a testator could not dispose of more than three-fourths of his property in legacies and must leave to his heir at least one-fourth, was expressly extended to gifts mortis causa,[37] with the result that a donor likewise could not give away more than three-fourths of his property. And traces of this Roman consolidation of gifts mortis causa with legacies have survived in the law of some modern countries, while the Roman imposition of a limitation upon the power to give away one's property has been followed not only as to testamentary bequests but also as to gifts — the portion of property not disposable varying from one-fourth to two-thirds.[38] In Roman law, gifts mortis causa were apparently not subject to the inheritance tax of 5%.[39] But in England these are made liable as if legacies.[40] (§ 660)

[36] See Mackeldey, Dropsie, *Roman law*[14], § 794. The Republican *lex Furia* and *lex Voconia* had applied not only to legacies, but also to gifts *mortis causa:* Gaius ii, 225–6; iv, 23.

[37] *Code*, 6, 50, 5; *Code*, 8, 56 (57), 2, 2; *Dig.* 39, 6, 27. This reservation was known as the *Falcidian fourth:* see *Dig.* 35, 2, 1; infra § 698.

[38] For instance, see *Civil code* of France, book iii, title ii; Italy, 1091; Spain, 654; Louisiana, book iii, title ii, chapter vi; Quebec, book iii, title ii; and infra §§ 697 et seq.

[39] Williams, *Inst. of Justinian*[2], p. 107.

[40] 8 and 9 Victoria, ch. 76.

TITLE II

MODES OF ACQUIRING AN AGGREGATE OF THINGS

Nature of aggregate acquisition or universal succession. § 661 So far we have been considering singular succession or the various modes of acquiring single things. But in Roman law it was also possible to acquire a mass of things or rights.[2] Inasmuch as this form of acquisition consisted in the transference, so far as conceivably possible, of the entire legal personality[3] of one individual to another, it is very appropriately described as universal succession. In other words, by aggregate or universal acquisition the entire property — assets and also liabilities — of one person passed to another.[4]

Not all of the various Roman examples of acquiring an aggregate of things were true cases of universal succession. And some of the Roman modes of universal succession were obsolete in the time of Justinian. The chief example of universal succession was inheritance.

[1] *Rerum universitas.*

[2] As to *acquisitio per universitatem*, see Gaius, 2, 98; *Inst.* 2, 9, 6.

[3] See supra § 431.

[4] "In general the law is concerned with it only when it is passing to him, an event which happens most obviously at death, but occurs also at other times. In such cases this mass of rights and duties, with the exception of those that are destroyed by the event which occasions the transfer, pass to some sort of a successor": Buckland, *Elementary Roman law*, § 57. See also Gaius, iii, 83–4; iv, 38; *Inst.* 3, 10, 1, and 3.

CHAPTER I

INHERITANCE

§662 **Inheritance defined. Dual nature of the Roman heir (heres): not only an heir, but also the prototype of the modern administrator or executor.** The Roman law conception of inheritance [1] was different from that of modern law; in Roman law it was the transmission of the personality of a deceased person to one or more persons called heirs (the universal successor [2]), while in modern law the emphasis is laid on the transmission of property and rights. In other words, the nature of the Roman heir had a dual aspect: he not only inherited property, but he was also the continuator of the decedent's 'legal personality' [3] with certain duties to perform for him. The modern Anglo-American sole testamentary heir or legatee who is also made sole executor, occupies a dual position somewhat analogous to the Roman heir.

In Roman law the heir's position was the same in both forms of inheritance — that is, whether he was designated on intestacy (*ab intestato*) by the law, or appointed by a will (*ex testamento* [4]). There might be several heirs: all together constituted legally the continuation of the personality of the intestate or testate decedent.

The Roman heir, as the legal representative of the decedent, to a very large extent occupied the position and did the work of the modern administrator or executor. He settled the estate, paid off the debts and discharged the legacies of the

[1] The usual technical term was "hereditas", but an inheritance was also called "universum jus defuncti", "bona defuncti", or also "familia": see *Inst.* 2, 9, 6; *Dig.* 10, 2, 2, pr.; and note following.

[2] "Hereditas nihil aliud est, quam successio in universum jus quod defunctus habuerit": *Dig.* 50, 17, 62.

[3] "Heredem ejusdem potestatis jurisque esse, cujus fuit defunctus, constat": *Dig.* 50, 17, 59. See supra § 431.

[4] Both of the above Latin expressions are used in Gaius, 2, 100; *Inst.* 2, 9, 6.

decedent. By Justinian's change of the ancient rule of unlimited liability to a liability limited to the assets of the deceased as ascertained by an inventory,[5] the heir approached more nearly the position of the modern official whose duty it is to settle the decedent's affairs and distribute his property. The modern administrator or executor was undoubtedly fashioned by the medieval Canon Law as closely as possible on the model of the administrative functions of the Roman heir. To this administrative officer of successions the Canon Law gave two new names, both of Roman law origin: administrator,[6] in case of intestate succession; executor,[7] in case of testamentary succession.

§ 663 **In the Roman law prior to Justinian the heir was subject to an unlimited liability for the debts and charges of the decedent's estate.** In the ante-Justinian law the responsibility of the heir was quite different from that in the Justinian law. As the universal successor to the deceased person the heir not only acquired all the decedent's assets, but also became responsible for the payment of all the decedent's debts[8] and charges — for instance, legacies. Moreover if the deceased person died insolvent or his estate failed to meet all of the debts, the heir was always liable for them.[9]

Consequently if the decedent's debts were greater than his assets — in other words if the deceased died insolvent — the inheritance was most aptly called a *damnosa hereditas*,[10] for the heir had to pay the decedent's debts out of his own pocket,[11] the property of the decedent being regarded as

[5] See infra § 664.

[6] See *Nov.* 95 "De administratoribus": but "administrator" meant a provincial governor.

[7] See *Nov.* 96 "De executoribus," etc.: but "executor" meant a minor officer of a court of justice.

[8] *Dig.* 37, 1, 3, pr. and § 1; *Dig.* 50, 16, frag. 119, 208; *Dig.* 5, 3, 50. But the strictly personal obligations and rights of the decedent were extinguished by his death: *Dig.* 43, 20, 1, 43; *Code*, 3, 33, 14.

[9] An exception was made in favor of a soldier: his liability was limited to the extent of the decedent's estate: Gaius, 2, 163; *Inst.* 2, 19, 6; *Code*, 6, 30, 22, pr. and § 15.

[10] See *Dig.* 50, 16, 119; *Dig.* 29, 2, 57, 1; *Dig.* 17, 1, 32; *Gaius*, 2, §§ 163, 258; Ulpian, *Reg.* 25, 16; *Inst.* 2, 19, 5; *Inst.* 2, 23, 6.

[11] *Dig.* 37, 1, 3, pr.

merged or confused with that of heir (*confusio bonorum*) as soon as the decedent's estate became vested in the heir.[12] And for a 1000 years prior to Justinian the heir's liability was always unlimited and never restricted.

§ 664 **In the law of Justinian the liability of the heir for the debts and charges of the decedent's estate was limited to the amount of the inventory of the estate, — a benefit introduced by Justinian.** The centuries-old unlimited liability of the heir was profoundly changed by the Emperor Justinian, who introduced the system of taking a decedent's property under benefit of inventory (*beneficium inventorii*[13]). In other words, Justinian abolished confusion or merger of the property of the decedent with that of the heir (confusio bonorum[14]) and in its place he substituted a complete separation of the property of the decedent from that of the heir (*separatio bonorum*[15]); and he limited the liability of the heir for debts and charges solely to the property of the decedent as determined by the amount of the inventory.[16] The influence of this innovation of Justinian has survived to the present time in modern law, which during the settlement of a decedent's estate keeps separate the property of the deceased person from that of the heir or the legatee, and which prescribes the making of an inventory to fix the liability of the estate for debts and charges.[17]

[12] As to the vesting of an inheritance (*aditio hereditatis*), see infra § 665.

[13] *Code*, 6, 30, 22 (A.D. 531); see *Nov.* 1, ch. 1 and 2. The inventory had to be made before a notary (*tabularius*) and in the presence of a certain number of witnesses representing the legatees and creditors: *Code*, 30, 22, 2 and 3. Ordinarily the inventory must be begun within one month of the date when the heir knew of the devolution of the inheritance, and it must be completed within two months more (although this period might occasionally be extended to a year: *Code*, id.).

[14] See supra § 663.

[15] What Justinian did was to extend to every heir making a proper inventory the privilege of limited liability previously confined to a soldier (supra § 663, second footnote). This favor of *separatio bonorum* had been allowed, in the ante-Justinian law, in a few cases: see Gaius, 2, 163; *Inst.* 2, 19, 6; *Dig.* 42, 6, 1; *Bas.* 9, 7, 38–44; *Code*, 6, 30, 22, pr. and § 15; *Code*, 7, 72, 5; infra § 665.

[16] "In tantum teneri, in quantum valere bona hereditatis contingit": *Inst.* 2, 9, 6.

[17] See Robinson, *Elementary law*[2], § 405.

The effect of Justinian's legislation was to virtually compel the making of an inventory if there was any suspicion as to the solvency of the inheritance [18]: for, although Justinian gave to the heir the option [19] of making an inventory, yet if the heir did not make it, he not only remained in the old position of unlimited liability,[20] but also became worse off by losing certain other privileges as heir.[21] The result was that, although theoretically there were two classes of heirs in the law of Justinian (those making and those not making an inventory), practically, every prudent heir would have taken care to make an inventory in order to avoid the ancient unlimited liability attaching to an heir. Somewhat reminiscent of the ancient unlimited liability of the Roman heir is a 17th century English decision rendered during the reign of Charles I, which held that an executor who failed to make his inventory was liable twenty years later for the payment of a legacy.[22]

Another consequence of Justinian's legislation was, that by the legal personality of the deceased becoming separated from that of the heir the claims of the heir were treated just as if the heir was a mere creditor. Still another consequence was, that if the inheritance did not show an inventory sufficient to pay all the creditors, some were paid prior to others, instead of all being paid in full by the heir as under the old rule. The order of priority of claims was as follows: (1) the funeral expenses; (2) the cost of the inventory and the expenses of settling the estate; (3) mortgage creditors; (4) unsecured creditors.[23] This order is practically the same to-day in Anglo-American law.[24]

§ 665 **The vesting of an inheritance (aditio hereditatis). The classes of Roman heirs: (1) necessary heirs.** In Roman law, death alone did not always operate to make a person heir to a deceased person — and this was true whether the decedent

[18] *Code*, 6, 30, 22, 1.

[19] *Inst.* 2, 19, 6.

[20] *Id.: Code*, 6, 30, 22, §§ 1, 12 and 14.

[21] See *Nov.* 1, ch. 2, 1.

[22] Spence, *Equity*, vol. i, p. 585.

[23] This is the order of claims given in *Code*, 6, 30, 22, § 9. See also *Code*, 6, 30, 22, §§ 4–8 and 11.

[24] See Robinson, *El. Law*[2], § 405.

(§665) died intestate or left a will. Usually an inheritance was not acquired — in other words, did not vest — until it had been accepted by the heir or heirs. This act of accepting or entering upon an inheritance was known as *aditio hereditatis*.[25]

So long as an inheritance remained unacquired or until it vested in the heir, it was considered as constituting an independent legal entity and was called a vacant inheritance[26] (*hereditas jacens*). It could sustain relations to the world: like the decedent, it could be debtor and creditor.[27]

The election of an heir to accept or decline an inheritance not yet vested (delata hereditas[28]) depended upon the class to which the heir belonged. Roman heirs were divided into three classes: necessary heirs; family heirs, — or descendants in power; all other heirs, — described technically as 'outside' heirs.

Necessary heirs (*necessarii heredes*[29]) were possible only in testamentary succession. A necessary heir was a slave of the testator appointed heir to the testator's estate when the master suspected that he would die insolvent, the purpose of such an appointment being to avoid the disgrace attached to bankruptcy — such stigma being thus made to attach to the heir rather than to the testator.[30] The slave, who was appointed heir, forthwith acquired his freedom; but he could not decline the inheritance, which immediately vested in him

[25] This term is used in *Dig.* 50, 17, 77.

[26] *Dig.* 41, 1, 34; *Inst.* 2, 14, 2; *Inst.* 3, 17, pr.; *Dig.* 28, 5, 31, 1; *Dig.* 43, 24, 13, 5; *Dig.* 1, 8, 1, pr. The expression *hereditas jacens* is derivable from *Dig.* 36, 4, 5, 20: "si hereditas jacuerit."

[27] Hence most Civilians call it a species of the artificial person (defined supra §§ 536): see Mackeldey (Dropsie), *Roman law*[14], § 154. But the view of Savigny (*System*, vol. iii, § 102) and of Sohm (*Roman law* — Ledlie[3], p. 513), that this theory is not satisfactory, is preferable. As to the subject of *hereditas jacens*, see *Dig.* 3, 5, frag. 3, pr. and § 6; frag. 21, § 1; Mackeldey (Dropsie), *Roman law*[14], § 737.

[28] "Delata hereditas intellegitur quam quis possit adeundo consequi": Dig. 50, 16, 151. "Sive ex testamento sive ab intestato . . . deferatur hereditas": *Dig.* 10, 2, 2, pr. The offer of an inheritance is sometimes termed *delatio* by medieval Civilians.

[29] Gaius, 2, 154; *Inst.* 2, 19, 1.

[30] Gaius, 2, 153–5; *Inst.* 2, 19, 1.

without any express acceptance on his part.[31] But to the *heres necessarius* was given the special benefit of separation of properties (*separatio bonorum*[32]); in other words, his after-acquired property could not be touched by the testator's creditors — this belonged solely to the necessary heir.

The classes of Roman heirs: (2) family heirs, — descendants in power. Family heirs were either ab intestato or testamentary. Family heirs consisted of the descendants in the power[33] of the decedent at the time of his death. They were called *sui heredes*,[34] or — to distinguish them from slaves necessary heirs — *sui et necessarii heredes*.[35] Originally it was impossible for a *suus heres* to decline an inheritance.[36] But finally the praetor granted him the right to refuse an inheritance (*beneficium abstinendi*[37]). But any meddling with the inheritance by the family heir was regarded as an acceptance (*aditio hereditatis*), and caused the suus heres to forfeit his right of abstention.[38] § 666

The classes of Roman heirs: (3) all other heirs, — technically described as 'outside' heirs. Descendants not in power,[39] agnates,[40] and actual strangers to the blood belonged to that class of heirs technically described as 'outside' heirs (*extranei heredes*[41]). In other words, 'outside' heirs were all § 667

[31] *Id.*

[32] See supra § 663, first footnote, and § 664. *Separatio bonorum* was a product of the praetorian law. Compare infra § 667 (near the end).

[33] As to the paternal power, see supra § 506.

[34] *Dig.* 38, 16, 14; *Dig.* 28, 2, 11; *Inst.* 3, 1, 2b; Gaius, 3, 2–4.

[35] Gaius, 2, 152, 156; *Inst.* 2, 19, pr. and § 2; Ulpian, *Reg.* 22, 24. See supra § 665.

[36] Hence the ancient significance of the words "sui et *necessarii*."

[37] *Dig.* 29, 2, 71, 4. It was also called *potestas abstinendi:* Gaius, 2, 163; *Inst.* 2, 19, 5. As to this right granted by the praetor, see Gaius, 2, 158; *Inst.* 2, 19, 2.

[38] *Dig.* 29, 2, frag. 71, §§ 3–8; frag. 91. But see *Dig.* 29, 2, frag. 11, 11 and 57; *Inst.* 2, 19, 5; Gaius, 2, 163. The familiar Roman expression signifying to meddle was *se immiscere.* As to the effect (on a *suus heres*) of Justinian's system of acceptance under benefit of inventory, see infra § 667 (near the end).

[39] See supra §§ 446, 514.

[40] See supra § 463.

[41] Gaius, 2, 161; *Inst.* 2, 19, 3.

(§ 667) heirs other than the necessary and the family heirs.[42] *Extranei heredes* might arise either ab intestato or by will; and they always had the right to accept or refuse an inheritance.[43]

To enable *extranei heredes* to determine whether or not they would take an inheritance, the praetorian law granted them a period of time for deliberation[44] (*jus deliberandi*), which was at least 100 days.[45] In certain cases Justinian increased this period to nine months or a year.[46] In the Early Imperial law the acceptance of an inheritance was either express and formal (*cretio*[47]), or constructive — that is, acting as heir by meddling with the decedent's property (*pro herede gerendo*[48]). Informal constructive acceptance alone existed in the Later Imperial law,[49] the ancient formal acceptance having been abolished over a century before Justinian.[50]

But after Justinian had introduced his new system of accepting an inheritance under benefit of inventory,[51] the old system of acceptance or refusal after deliberation lost its importance. The new system established by Justinian was applicable to *all classes* of heirs.[52] But an *extraneus* heir did not have a cumulative right to both the benefit of deliberating and the benefit of inventory: he must elect to take one or the other; and if he chose the old right to deliberate, he was held to the ancient unlimited liability of an heir if he accepted.[53]

[42] See supra §§ 665–6.

[43] Gaius, 2, 162; *Inst.* 2, 19, 5.

[44] *Dig.* 28, 8, 1, 1.

[45] *Dig.* 28, 8, 2; Gaius, 2, 170. This time might be extended in certain cases: *Dig.* 28, 8, 3–4. To assist in arriving at a decision, the heir could examine the decedent's accounts: *Dig.* 28, 8, 5 pr. See also *Dig.* 28, 8, 7, 3; *Dig.* 28, 8, 9.

[46] *Code*, 6, 30, 22, § 13.

[47] Gaius, 2, 164–73; Ulpian, *Reg.* 22, 34.

[48] Gaius, 2, 167–9; *Inst.* 2, 19, 7.

[49] *Inst.* 2, 19, 7 still give "pro herede gerendo."

[50] *Code*, 6, 30, 17 (A.D. 407). Cretio had been partly abolished by Constantine the Great a century earlier: *Cod. Theod.* 8, 18, 1, 1.

[51] See supra § 664.

[52] See *Code*, 6, 30, 22, §§ 1a–4; *Inst.* 2, 19, 5–6. These authorities refer to heirs who have either the right to abstain (*sui*, — see supra § 666) or the right to deliberate (*extranei*, — see this section); and by implication include also the *necessarii* (supra § 665).

[53] *Inst.* 2, 19, 6; *Code*, 6, 30, 22, § 14; supra § 663.

Consequently a prudent heir would have taken care to elect the new Justinianean system.

Partition of an inheritance. In both Roman and modern law it is possible for several heirs to obtain a partition or division of their inheritance by judicial decree.[54] § 668

Inheritance taxes. The taxation of inheritances was well known to the Imperial Roman law, being introduced very early during the Empire.[55] For the support of his military forces Augustus imposed a tax of 5% on all inheritances and legacies acquired by Roman citizens, — the decedent's children alone being exempted from this tax.[56] And a contemporary jurist, the celebrated Ofilius, was the first to write a book on the new law.[57] § 669

The Emperors Nero and Trajan enlarged the exempted class by including parents, brothers, or sisters; and they also exempted small inheritances and legacies.[58] The Emperor Caracalla, to make the inheritance tax more productive, granted Roman citizenship to all free provincial subjects throughout the Empire,[59] and doubled the tax to 10%.[60] But this increase seems to have been unpopular; and the old rate of 5% was restored by Caracalla's successor Macrinus.[61] This inheritance tax was no longer imposed in the time of Justinian.[62] The Roman inheritance tax of Augustus is the

[54] *Actio familiae erciscundae:* see *Dig.* 10, 2; *Code*, 3, 36; supra § 644.

[55] On the subject of inheritance taxes, see Dio Cassius, lv, 25, lxxvii, 9, lxviii, 12; Pliny, *Paneg.* 37–40; Gaius, 3, 125; Paulus, *Sent.* 4, 6; *Dig.* 1, 2, 2, 44; *Code*, 6, 33, 3, pr.; Roby, *Roman private law*, vol. i, pp. 24, 188, vol. ii, p. 32, note 2; Poste, *Gaius*[4], p. 360; Bauchand, *De l'impot de vingtième sur les successions;* Smith, *Dict. of Greek and Rom. antiquities*[3], "vicesima."

[56] Dio Cassius, lv, 25. This was the *lex Julia de vicesima hereditatum* (A.D. 6).

[57] *Dig.* 1, 2, 2, 44. As to Ofilius, see supra vol. i, § 53.

[58] Roby, *Roman private law*, vol. ii, p. 32, note 2.

[59] See supra § 443.

[60] "Decima," — *Dio Cassius*, lxxvii, 9.

[61] *Dio Cassius*, lxxvii, 9; lxviii, 12.

[62] *Code*, 6, 33, 3, pr.

parent of the modern policy of taxing inheritances or successions which prevails in Europe and America.[63]

1. INTESTATE SUCCESSION[64]

§670 **Intestate succession defined.** When a person dies without making a will, or leaves a will which is void or becomes of no effect, both Roman and modern law provide for intestate succession to the property of the decedent.[65] Although intestate succession was the earlier form of inheritance in Roman law, yet Roman law attached more importance to testate succession. And, after the law of wills was developed, intestate succession was exercised with comparative infrequence.

§671 **The Roman systems of succession ab intestato: (1) system of inheritance (hereditas) established by the ancient law for citizens (jus civile), which favored agnatic relationship.** At different times in Roman law there were three systems of intestate succession: that of the ancient law for citizens (jus civile), that of the praetorian law, and that of the Justinian law. The first two began under the Republic, but were gradually blended under the Empire with the praetorian system dominating. Finally, about 1000 years after the Law of the XII Tables, the praetorian system completely triumphed in the order of succession established by Justinian.

The system of succession ab intestato established by the ancient law for citizens (jus civile[66]) favored in every way possible the agnatic tie of relationship, the order of succession

[63] See *Minnemacher* v. *State*, 119 Wis. 190, 108 N. W. Rep. 627, 9 Am. and Eng. Ann. Cases, 711, 9 L. R. Ann. (N. S.) 121; Kerr, *Inheritance taxation*, 71 Cent. Law Journal, p. 75. Almost all the American states of the United States have such laws, which proceed along the lines of the death-duties of Great Britain.

[64] Intestate succession is treated before *testate* succession in the French, Italian, German, Louisiana, Chilean, and Quebec civil codes. In the Spanish and Mexican codes, testate succession comes first.

[65] *Dig.* 50, 16, 64; *Inst.* 3, 1, pr.; Robinson, *American jurisprudence*, § 337.

[66] See supra vol. i, §§ 33, 36, 40, 44.

being as follows: first, descendants in power[67]; second, agnatic ascendants[68]; third and last, cognatic relatives.[69] The agnates shared the inheritance *per capita*.[70]

The Roman systems of succession ab intestato: (2) system of inheritance (bonorum possessio) established by the praetorian law, which favored cognatic relationship. At the time of the development of the praetorian law[71] the system of succession of the old civil law (jus civile) was seen to be defective and insufficient.[72] Consequently the praetors began to employ their wide powers to liberalize the law of inheritance. Two great changes in the Roman law of inheritance finally resulted from their labors: emancipated children were allowed to succeed along with descendants in power[73]; and more remote cognatic or blood relatives were allowed to succeed after the agnatic relatives.[74] § 672

But the praetors, when they permitted on petition these and other persons not heirs by the jus civile to succeed to property of a decedent, were scrupulously careful to respect the jus civile by awarding to the petitioner not the inheritance (*hereditas*[75]) but the possession of the decedent's property (*bonorum possessio*).[76] Furthermore, the person obtaining

[67] *XII Tables*, 5, 4; Gaius, 3, 1–8; Ulpian, *Reg.* 26, 1–3; *Collatio Mosaic. et Rom.* 16, 2, 1; *Inst.* 3, 1, 1–8. Descendants in power were also called family heirs (*sui heredes*), — see supra § 666.

[68] *XII Tables*, 5, 4; Gaius, 3, 9; Ulpian, *Reg.* 26, 1, 4, and 5; *Coll. Mos. et Rom.* 16, 2, 9; *Inst.* 3, 2, pr.

[69] The *gentiles:* see *XII Tables*, 5, 5; Gaius, 3, 17; Ulpian, *Reg.* 26, 1a; *Coll. Mos. et Rom.* 16, 4. But succession of the *gentiles* early fell into disuse: Ulpian, *Reg.* 26, 1a.

[70] Ulpian, *Reg.* 26, 4. As to agnation, cognation, ascendants, and descendants in power, see supra §§ 463–5, 506.

[71] See supra vol. i, § 41.

[72] See Sohm (Ledlie[3]), *Roman law*, pp. 515 et seq., as to the origin of *bonorum possessio*.

[73] As to emancipated and non-emancipated children, see supra §§ 446, 506, 514.

[74] The ties of relationship are defined supra §§ 463–5.

[75] See supra § 671.

[76] On the subject of bonorum possessio, see Gaius, 3, 32–8; *Inst.* 3, 9; Theophilus, 3, 9. Bonorum possessio was not limited to cases of intestate succession, — it might sometimes arise in cases of testamentary succession: *Id.*

from the praetor the property of the deceased was called *bonorum possessor*, and not heir (*heres*). Nevertheless, although this distinction as to civil and praetorian successions was of great theoretical importance, in reality there was little difference: the praetorian bonorum possessio was practically as much of a universal succession as the hereditas devolving by the jus civile,[77] and the praetorian bonorum possessor was practically as good a universal successor as the heres of the jus civile.

The praetorian system of succession ab intestato favored the cognatic or blood tie of relationship, the order of succession being as follows: first, children whether in power or not (*ex edicto unde liberi*[78]); second, statutory heirs (*ex edicto unde legitimi*[79]); third, all blood relatives not previously mentioned (*ex edicto unde cognati*[80]); fourth and last, the husband or wife of the decedent (*ex edicto unde vir et uxor*[81]).

§ 673 **Collation (collatio), — a duty prescribed by the praetorian law. Influence of the Roman collation on modern law.** To allow an emancipated[82] child or a married daughter provided with a dowry[83] to share in the property left by their father and also to keep all property acquired since emancipation (if an emancipated child) or to keep the dowry (if a married daughter), worked a grave injustice to children or grandchildren in power: for descendants in power could acquire nothing for themselves, and on the death of the head of their family they merely obtained what he had left — which of course would have been much larger, if he had not emancipated the child or given away the dowry.

[77] "Itaque successiones per universitatem hae sunt: hereditas, bonorum possessio": Theophilus, 3, 12, pr. (Ferrini).

[78] Gaius, 3, 26; Ulpian, *Reg.* 28, 8; *Dig.* 38, 6; *Inst.* 3, 9, 3; *Inst.* 3, 1, 9–13; *Coll. Mos. et Rom.* 16, 8. See *Dig.* 37, 8.

[79] Gaius, 3, 27–8; *Dig.* 38, 7; *Inst.* 3, 9, 3; *Coll. Mos. et Rom.* 16, 8. These heirs were largely agnatic.

[80] Gaius, 3, 28–31; Ulpian, *Reg.* 28, 9; *Dig.* 38, 8; *Inst.* 3, 9, 3; *Inst.* 3, 5–6; *Coll. Mos. et Rom.* 16, 8.

[81] *Collatio Mos. et Rom.* 16, 8; *Dig.* 38, 11; *Inst.* 3, 9, 3 and 7. The succession between husband and wife is specially considered infra § 676.

[82] Supra § 514.

[83] Supra § 478.

Consequently this situation was remedied by the praetorian law, which denied the rights of the emancipated child and the married daughter with a dowry to share in the property left by their father, unless the emancipated child returned his after-acquired property, and the married daughter her dowry, to the estate of their father to be divided between them and their brothers or sisters in power.[84] (§ 673)

The principle of collation descended into the law of Justinian, and thence into many modern systems of law — for instance the French, German, Italian, Spanish, Chilean, and Louisiana law.[85] And the Roman term itself — "collatio" — survives in the Spanish "colación", the Italian "collazione", and the Louisiana and Porto Rican "collation". The scope of the modern law collation is excellently indicated by the Louisiana Code "as the return to the mass of the succession which an heir makes of property received in advance of his share or otherwise, in order that the property may be divided together with the other effects of the succession," [86] the obligation of collating being "founded on the equality which must be naturally observed between children and other lawful descendants, who divide among them the succession of their father, mother, and other ascendants." [87]

Finally, the influence of the Roman principle of collation has extended to Anglo-American law. According to Lord Coke, the English Common Law hotchpot "is that in effect which the Civilians call "collatio bonorum".[88] Moreover, Blackstone mentions the same Roman source, and calls hotchpot a "just and equitable provision." [89] Hotchpot means the returning of an advancement or other benefit enjoyed by

[84] *Dig.* 37, 6, 1, pr.; *Code*, 6, 20, const. 3, 9, 12, 16–17, and 20. See *Dig* 37, 6, 2, 2; *Nov.* 97, 6; *Nov.* 18, 6; *Dig.* 5, 2, 25, pr.; *Code*, 3, 28, 35, 2. The collation required of the emancipated was called *collatio bonorum* (see *Dig.* 37, 6); that required of the married daughter with a dowry *collatio dotis* (see *Dig.* 37, 7).

[85] *Civil code* of France, 843; Germany, 2050; Italy, 1001; Spain, 1035; Porto Rico, 1001; Chile, 1185; Louisiana, 1227.

[86] Art. 1227.

[87] Art. 1229.

[88] 1 Coke, 177a; Scrutton, *Rom. law in Eng.* p. 133.

[89] *Commentaries*, vol. ii, p. 516. See Williams, *Inst. of Justinian*[2], p. 158.

the recipient into the common stock of property in order to equalize the shares of all to whom this stock of property belongs.[90]

§674 **Early Imperial statutory innovations in the praetorian system of intestate succession: the SC. Tertullianum and the SC. Orphitianum, which enabled mothers and children to inherit ab intestato from each other.** During the Empire the reaction against the ancient Roman privileges of agnatic relationship was continued. In the reign of Hadrian, mothers were granted a right of succession to their children by a statute known as the senatusconsultum Tertullianum.[91] And in the reign of Marcus Aurelius, children were granted the right to succeed to their mothers by the SC. Orphitianum.[92]

§675 **The Roman systems of succession ab intestato: (3) system of intestate succession established by Justinian; world-wide survival of Justinian's legislation in modern law.** In the middle of the 6th century A.D. the Emperor Justinian established a system of intestate succession based on the superiority of the blood tie or cognatic relationship: who were legal heirs entitled to inherit, was determined by proximity of relationship to the deceased person. This was but the final triumph of the liberalizing spirit of the praetorian system of succession. Justinian's famous statutes of distributions ab intestato are Novels 118 and 127.[93]

Justinian's laws together with the Roman conception of intestacy [94] underlie every modern system of inheritance ab intestato,[95] including the Anglo-American. In England

[90] See 2 Kent, *Commentaries*, vol. ii, p. 421; *Law* v. *Smith*, 2 R. I. Rep. 249; *Ray* v. *Loper*, 65 Mo. Rep. 472; *Jackson* v. *Same*, 28 Miss. Rep. 680, 64 Am. Dec. 114; *Thompson* v. *Carmichael*, 3 Sandf. Chan. (N. Y.), 120.

[91] *Inst.* 3, 3, 2; Ulpian, *Reg.* 26, 8; Paulus, *Sent.* 4, 9; *Dig.* 38, 17. The exact date of this statute is not known, but Hadrian reigned A.D. 117–38.

[92] *Inst.* 3, 4, pr.; Ulpian, *Reg.* 26, 7; Paulus, *Sent.* 4, 10; *Dig.* 38, 17, 1, pr. See Gaius 3, §§43, 51; Ulpian, *Reg.* 29, 2; *Dig.* 38, 17, 1, 9. The date of this statute is A.D. 178.

[93] These were promulgated A.D. 543 and 548, respectively. The provisions of these statutes superseded the old law of intestate succession as found in the earlier Digest, Institutes (both A.D. 533) and Code (A.D. 534). In particular Institutes, book 3, titles 2–6 and 9 became obsolete.

[94] Supra §670.

[95] References to the Modern Codes will be found infra vol. iii, §1000.

during the latter half of the 12th century, the right of the next of kin to succeed to the goods of an intestate decedent was firmly established and sanctioned by the royal courts.[96] And Blackstone himself confesses that the English statute of distributions resembles the Roman law of succession ab intestato.[97] It is an event of no small meaning that the earliest English statute of distributions[98] was drawn by a Civilian, Sir Walter Walker.[99] And this fact seems to sting Blackstone's pride and prejudices as a Common-Lawyer, for he at once tries hard to explain that Parliament did not copy it from the Roman law![100] But his laborious explanation is not very convincing. The present American state statutes of distributions are essentially like the Justinian Novels 118 and 127 — if anything they are more Roman than the laws of England, where traces of feudalism still survive. (§ 675)

Turning now to **Justinian's order of succession ab intestato,** his legislation established three classes of heirs: descendants, ascendants, and collaterals.[101] Modern law is the same as the Roman. For instance, the Louisiana Code reads as follows: "There are three classes of legal heirs, to wit: the children and other lawful descendants; the fathers and mothers and other lawful ascendants; and the collateral kindred."[102]

1. **Descendants.** Justinian enacted that the descendants should be called first to an inheritance; and that if there are any descendants, these should exclude all ascendants and collaterals.[103] In the class of descendants Justinian placed the children,[104] grandchildren, and so forth, of the deceased

[96] Glanville, 6, 7. See supra vol. i, § 372.

[97] *Commentaries*, vol. ii, p. 516.

[98] Enacted A.D. 1670–71.

[99] Lord Raymond's Reports, 574.

[100] Blackstone, *Id.*

[101] "Ab intestato successio tribus cognoscitur gradibus, hoc est ascendentium et descendentium et ex latere": *Nov.* 118, praefatio. These relationships are defined supra §§ 463–5.

[102] *Civil code*, 887.

[103] *Nov.* 118, ch. 1.

[104] These included **posthumous** children: *Inst.* 3, 1, 2b; *Inst.* 3, 1, 8: *Inst.* 3, 9, pr. And the English Common law is the same as the Roman:

(§ 675) person; and he provided that grandchildren should take *per stirpes* the share of their parent dying before the decedent.[105]

Modern law does not differ from the Roman, as will be seen from the following illustrations. "Succession pertains, in the first place, to the descending direct line."[106] "Legitimate children or their descendants inherit from their father and mother, grandfathers or other ascendants, without distinction of sex or primogeniture, and though they may be born from different marriages."[107] "The children of the deceased shall always inherit from him in their own right, dividing the inheritance in equal shares."[108] "The grandchildren and other descendants shall inherit by right of representation."[109] "All the residue (after the share of husband or wife has been distributed) of the real and personal estate shall be distributed in equal proportions, according to its value at the time of distribution, among the children and the legal representatives of any of them who may be dead."[110] "The right which all the relatives of a person have to succeed him in all the rights which he would have if alive, or which he might have inherited is called the right of representation."[111] "Representation takes place *ad infinitum* in the direct descending line."[112] "Whenever the inheritance is taken by representation, the division of the estate shall be made *per stirpes;* thus the representative or representatives do not inherit any more than that which the person they represent would inherit if alive."[113]

children *en ventre sa mère* have capacity to inherit (Williams, *Inst. of Justinian* [2], p. 33). For the ancient Roman law, see Gaius, 2, 241–2. Compare *Inst.* 2, 20, 26–8.

[105] *Id.* Justinian says "in stirpes."

[106] *Civil code* of Porto Rico, 904; Spain, 930.

[107] *Civil code* of Louisiana, 902. Art. 745 of the French Civil Code is the same.

[108] *Civil code* of Porto Rico, 906; Spain, 932. Art. 745 of the French Civil Code and art. 902 of the Louisiana Civil Code are in substance the same.

[109] *Civil code* of Porto Rico, 907; Spain, 932. See France, 745; and Louisiana, 902, which hold the same.

[110] *General statutes* of Connecticut (revision of 1902), § 396.

[111] *Civil code* of Porto Rico, 898; Spain, 925.

[112] *Civil code* of Louisiana, 895.

[113] *Civil code* of Porto Rico, 900.

It should not be overlooked that in Anglo-American law the (§ 675)
term *per stirpes* is employed in its Roman sense.[114]

2. **Ascendants (and also concurrently brothers or sisters of the whole blood, if any).** In the class of ascendants Justinian placed the father, mother, grandparents, and so forth, of a deceased person[115]; and he enacted that the ascendants should exclude all collateral relatives (other than brothers or sisters of the whole blood — these succeeded along with the nearest ascendants,[116] children of predeceased brothers or sisters taking their parents' share[117]). Justinian provided also that the nearer ascendant should always be preferred to the more remote[118]; and that where there are several ascendants of the same degree, the inheritance should be thus divided equally between them as follows: one-half to the paternal ascendants, and the other half to the maternal ascendants.[119]

These provisions of Justinian are repeated in modern law, as will be seen from the following illustrations. The statutes of the state of Connecticut provide that "if there be no children or any legal representatives of them, then, after the portion of the husband or wife, if any, is distributed or set out, the residue of the estate shall be distributed equally to the parent or parents of the intestate."[120] Spanish law provides that "in default of legitimate children and descendants, his ascendants shall inherit from him to the exclusion of collaterals."[121] And the Louisiana and French Codes provide for the succession of brothers and sisters along with the ascendants, children of predeceased brothers or sisters taking their parents' share by representation.[122] The French, Spanish, and Louisiana laws provide for the division of the property between the two lines

[114] Williams, *Inst. of Justinian*[2], p. 158; Black, *Law dict.*[2], "per stirpes."

[115] *Nov.* 118, ch. 2.

[116] *Id.* But see infra § 676.

[117] *Nov.* 127, ch. 1.

[118] For instance, the parents or parent exclude the grandparents.

[119] *Nov.* 118, ch. 2.

[120] § 398 of *General statutes.*

[121] *Civil code* of Spain, 935. That of Porto Rico is almost verbatim the same.

[122] *Civil code* of France, 748, 749; Louisiana, 903–4. The Spanish and Porto Rican codes omit this provision.

(§ 675) of ascendants, just as Justinian did.[123] "In default of father and mother the ascendants nearest in degree shall succeed. If there are some of equal degree belonging to the same line they shall share the inheritance *per capita;* if they are of different lines but of equal degree, one-half shall go to the paternal ascendants and the other half to the maternal ascendants. In each line the division shall be made *per capita.*" [124]

3. **Collaterals.** Justinian enacted that the last to succeed should be the collaterals[125] (other than those already mentioned). Justinian provided that the collateral relatives of a deceased person should succeed according to their degree of relationship — the nearer excluding the more remote; that brothers or sisters of the whole blood (and if predeceased, their children) should exclude all other collaterals; that if there were no brothers and sisters of the whole blood and their children, then the brothers and sisters of the half-blood (and if predeceased, their children) should exclude all other collaterals; and, lastly, that if there were no brothers or sisters whatever, the nearest cognatic or blood relatives should succeed — but the share of a predeceased cognate did not descend to his children.[126] Collateral heirs who were in the same degree of relationship shared equally *per capita.*

Modern law, like the Roman law of Justinian, provides that collaterals shall constitute the last class of heirs to be called to an inheritance. And although there are unavoidable differences of detail as to the order in which the collaterals shall succeed, the main lines of modern collateral succession are Roman. For instance, brothers and sisters come first[127] or are greatly favored over other collaterals[128]; brothers and sisters of the half-blood are preferred to more remote col-

[123] *Civil code* of France, 746; Spain, 937; Porto Rico, 911; Louisiana, 906.

[124] *Civil code* of Spain, 937; Porto Rico, 911.

[125] *Nov.* 118, ch. 3. See sub-section *2. Ascendants, etc.*, of this § 675.

[126] All the above provisions are given in *Nov.* 118, ch. 3.

[127] *General statutes* of Connecticut, § 398; *Civil code* of France, 750; Louisiana, 912.

[128] *Civil code* of Spain, 948; Porto Rico, 916.

laterals[129]; if there are no brothers and sisters whatever, the nearest blood relatives succeed[130]; and, as in Roman law, collaterals who are in the same degree of relationship share *per capita*.[131]

Succession of husband and wife. By the praetorian law a surviving husband or wife was called to the inheritance, if there was no heir at all[132] — but the most distant relative would exclude the surviving spouse.[133] And such was the law during the Empire,[134] until Justinian extended a larger measure of successoral rights to the *widow*. § 676

By his legislation, if the wife had no dowry,[135] she was entitled to share in the estate of her husband as follows: if there were no children, she should receive one-fourth in full ownership; if there were more than three children, she should receive only a life-use (usufruct[136]) of an equal share with the children, who should retain the ownership of her share; if there were three or less children or any relative of the husband, she should receive one-fourth in full ownership.[137]

Although Justinian did at one time enlarge the husband's ancient right of succession,[138] he soon changed his mind and reverted to the old right as fixed by the praetors — which remained the law during the rest of Justinian's reign.[139]

[129] *Gen. statutes* of Connecticut, § 398; *Civil code* of Spain, 950, 954; Porto Rico, 918, 921; France, 752–3; Louisiana, 913–14

[130] *Gen. statutes* of Connecticut, § 398; *Civil code* of France, 753; Louisiana, 914; Spain, 955; Porto Rico, 921.

[131] *Id.:* "equally", "equally and by heads", "par tête" are some of the expressions used. See Williams, *Inst. of Justinian*[2], p. 158; Black, *Law dict.*[2], "per capita."

[132] *Inst.* 3, 9, 6; *Dig.* 38, 11. *Code*, 6, 18. See supra § 672.

[133] *Cod. Theod.* 5, 1, 9. This statute records the abolition of some earlier constitution which attempted to prefer the surviving spouse to an heir.

[134] *Code*, 6, 18 (A.D. 428), which expressly affirms this ancient form of succession between the spouses.

[135] Defined supra § 478.

[136] Defined supra § 586.

[137] *Nov.* 117, ch. 5 (A. D. 542), repealing *Nov.* 53, ch. 6 (A.D. 537).

[138] *Nov.* 53, 6, which gave needy husbands and wives one-fourth of the estate of the decedent.

[139] *Nov.* 117, ch. 5.

§ 677 **Disposition of the property of an intestate decedent without heirs; the State as ultimus heres.** When a deceased person left no heir at all, the Roman law provided that his property — aptly termed *bona vacantia* or *caduca* [140] — should go to the State, subject to the payment of the decedent's debts to the extent of his assets left.[141] The State is ultimus heres also in modern law, including the Anglo-American.[142]

2. TESTATE SUCCESSION

(1) Wills (Testamenta)

§ 678 **Testate or testamentary succession defined.** When a person dies leaving a will designating the heirs or persons to inherit, both Roman and modern law provide for testate or testamentary succession to the property of the decedent.[143] In Roman law nobody, except a soldier, could die partly testate and partly intestate.[144] Modern law has generalized this exception, and made partial intestacy possible for everybody.[145]

§ 679 **Essence and requisities of a Roman will.** It was deemed disgraceful by the Romans to die intestate. Therefore the essential object of a Roman will was the appointment of an heir (*heredis institutio*). A will in which no heir was instituted or appointed was a nullity; and if the appointment of the heir or heirs failed, the rest of the will also failed.[146] So supreme was the appointment of the heir, that, until Justinian changed

[140] This word is of later use, being introduced by the *lex Julia de maritandis de ordinibus* (A. D. 4).

[141] On *bona vacantia* or *caduca* see *Dig.* 49, 14, 2; Ulpian, *Reg.* 28, 7; Gaius, 2, 150; *Dig.* 44, 3, 10, 1; *Code*, 10, 10; Mackeldey (Dropsie), *Roman law*[14], §§ 682, 156; Poste, *Gaius*[4], pp. 205–7. These devolved upon the *fiscus* or treasury department of the Roman State.

[142] See *Civil code* of Louisiana, 1905, 1204 ("vacant" successions); Spain, 956; Porto Rico, 923; France 811–13; *Crane* v. *Reeder*, 21 Mich. 70, 4 Am. Rep. 430; Black, *Law dict.*[2], "escheat."

[143] *Dig.* 28, 1, 1; Robinson, *American jurisprudence*, § 332. "Testamentum ex eo appellatur quod *testatio mentis est*": *Inst.* 2, 10, pr.

[144] *Dig.* 50, 17, 7.

[145] See for instance Williams, *Inst. of Justinian*[2], p. 127.

[146] Gaius, 2, 229; *Inst.* 2, 20, 34; *Inst.* 2, 23, 2; Gaius, 2, 248; *Dig.* 28, 6, 1, 3; *Dig.* 50, 17, 181.

the law, if a legacy was made in the will prior to the designation of the heir, this legacy was void.[147] The primary purpose of the English or American will is unlike that of the Roman will. The essential object of a will in Great Britain or the United States is the disposition or transfer of property; and a will is valid even if it does not appoint an executor.[148]

A Roman will was a complex affair. There were various requisites to be complied with in order to render a will effectual. These were: the testator, witnesses, and heir or heirs must be legally capable; certain forms must be observed in making the will; an heir must be properly appointed; certain relatives must either be made heirs or disinherited; and, lastly, certain relatives must receive a definite portion of the testator's property.

Capacity to make a will. In Roman law not every person § 680
had capacity to make a will (*testamenti factio activa*[149]): only those persons who were citizens and of sound mind and capable of holding property could make a will.[150] For instance slaves,[151] persons in power,[152] the insane, spendthrifts subject to curators, and persons born deaf and dumb[153] could not make a will.[154]

[147] Gaius, 2, 229; *Inst.* 2, 20, 34; *Code*, 6, 23, 24.

[148] See Williams, *Inst. of Justinian*[2], p. 119; Schouler, *Wills*[2], §§ 268–9.

[149] *Dig.* 28, 1, frag. 4; frag. 18, pr; *Inst.* 2, 19, 4; Ulpian, *Reg.* 20, 8. This phrase is Roman, except the word "activa" which Civilians have added to distinguish capacity to make a will from capacity to take under a will (infra § 682). A testator should have *testamenti factio* not only at the time of making his will, but also at the time of his death.

[150] Compare supra §§ 429, 433.

[151] But public slaves (i.e., of the State) under the Empire could make a will as to one-half of their *peculium* or personal belongings (supra § 434): Ulpian, *Reg.* 20, 16.

[152] But under the Empire a person in power could make a will as to his *peculium castrense* or *quasi castrense* (supra § 512): Ulpian, *Reg.* 20, 10; Gaius, 2, 106; *Inst.* 2, 11, 1; *Inst.* 2, 12, pr.; *Dig.* 45, 3, 18, pr.; *Code*, 3, 28, 37, pr. and 1a.

[153] But persons either deaf or dumb could make a will — the dumb only if able to write, and then the will must be a *written* will: *Code*, 6, 22, 10; see infra § 688, note.

[154] See *Inst.* 2, 12; *Code*, 6, 22; *Code*, 6, 23, 29; Ulpian, *Reg.* 20, 10 et seq.; Gaius, 2, 112, et seq.; *Dig.* 28, 1.

§ 681 **Capacity to act as a witness.** In Roman law not everyone was competent to act as a witness to a will.[155] The following persons were incompetent: slaves[156]; women[157]; persons of unsound mind[158]; deaf, dumb, or blind persons[159]; any person appointed as heir in the will[160]; and persons in the power[161] of the testator.

§ 682 **Capacity to take under a will.** In Roman law not every person had capacity to take property under a will (*testamenti factio passiva*[162]): only those persons who were citizens[163] and certain[164] could receive property by virtue of a will. English law is like the Roman in requiring that the person to take shall be certain.[165]

§ 683 **Forms of Roman wills in the ante-Justinian law: (1) will made by a special legislative act (calatis comitiis).** There were many forms of Roman wills, the most important of which belong to the era of the Emperor Justinian.[166] Prior to Justinian there were four forms of wills: will made by a special

[155] See *Inst.* 2, 10, §§ 6–11; Ulpian, *Reg.* 20, 8.

[156] *Inst.* 2, 10, 6. See supra § 434.

[157] *Inst.* 2, 10, 6.

[158] *Id.*

[159] *Id.*

[160] *Inst.* 2, 10, 10.

[161] *Inst.* 2, 10, 9. See supra §§ 446, 506.

[162] *Inst.* 2, 19, 4: *Dig.* 28, 1, 16, pr; *Dig.* 41, 8, 7; Ulpian, *Reg.* 20, 8. This phrase is Roman, except the word "passiva" which Civilians have added to distinguish capacity to take under a will from capacity to make a will (supra § 680). A person to take property under a will must have capacity (*testamenti factio*) at three different times: at the making of the will, at the death of the testator, and at the time the inheritance vests or is acquired (supra § 665). According to *Dig.* 28, 5, 60, 4, an heir suffering an incapacity between the making of the will and the testator's death, was not debarred from inheriting if at the death of the testator this incapacity no longer existed.

[163] See supra § 441.

[164] "Incerta persona heres institui non potest": Ulpian, *Reg.* 22, 4. But a **posthumous** child might be appointed as heir in advance: see Girard, *Droit romain*[5], p. 821; Gaius, 2, 140–141; *Inst.* 3, 9, pr; *Dig.* 37, 11, 3.

[165] Williams, *Inst. of Justinian*[2], pp. 127–8; *Lowndes* v. *Stone*, 4 Vesey Rep. 649.

[166] Reigned A.D. 527–65.

legislative act, will made just before a battle, will made by mancipatio, and the praetorian will. All of these originated in the Ancient Roman law,[167] and were obsolete in the time of Justinian.

The will made by a special legislative act (*calatis comitiis*) was an enactment of that assembly known as the *comitia curiata*,[168] which met twice a year to pass 'testamentary acts'. The legislature was probably resorted to either for the purpose of obtaining an heir to a man who had no natural heir, or for substituting an heir for the natural heir.[169] This form of will was no longer in use in Cicero's time.[170]

Forms of Roman wills in the ante-Justinian law: (2) will made just before a battle (in procinctu). This will was made in contemplation of an approaching battle by citizens in battle array.[171] Plutarch tells us that a soldier could make this will by simply naming before three or four witnesses the persons whom he desired to be heirs.[172] This form of will was getting obsolete in Cicero's time.[173] § 684

Forms of Roman wills in the ante-Justinian law: (3) will made by mancipatio (per aes et libram). This will was an outright conveyance of the inheritance made in the presence of five witnesses by the ceremony of mancipatio, a conveyance by money and the balance.[174] The buyer was called the purchaser of the family property (*familiae emptor*); and he was charged with handing over the inheritance to an unknown successor named in a sealed document drafted by the testator. It is very likely that this is the form of will mentioned in the Law of the XII Tables. The will made by mancipatio still existed during the Early Empire in the time of the jurist Gaius,[175] § 685

[167] See supra § 416.

[168] See Gaius, 2, 101; Cicero, *De orat.* 1, 53; *Inst.* 2, 10, 1. The *comitia curiata* was a patrician legislature: see supra vol. i, § 49.

[169] Hunter, *Roman law*[4], p. 766.

[170] *De orat.* 1, 53.

[171] Gaius, 2, 101; Cicero, *De nat. deor.* 2, 3; *Inst.* 2, 10, 1.

[172] *Life of Coriolanus.*

[173] *De nat. deor.* 2, 3.

[174] Gaius, 2, 102–4; *Inst.* 2, 10, 1. See supra § 570.

[175] See supra vol. i, § 86.

but it probably disappeared during the Later Empire in the 5th century A.D.[176]

§ 686 **Forms of Roman wills in the ante-Justinian law: (4) the praetorian will.** This will was made by the testator showing it to *seven* witnesses who placed thereon their names and seals.[177] It was really a deformation of the will made by mancipatio.[178] The praetorian will came into general use during the Early Empire, and served as the basis for the final form of the written Roman will as found in the time of Justinian.

§ 687 **Forms of Roman wills in the Justinian law: (1) the written will.** The usual will of the Justinian law was a written will, shown by the testator to *seven* witnesses, and then subscribed — signed at the end — by him in the presence of the witnesses, who then affixed their signatures and seals to the will.[179]

The making of a written will in England and the United States demands the observance of all these formalities so essential to the making of this fully developed Roman will, — the only change being a reduction of the number of witnesses from seven to usually three.[180] Blackstone observes that the publication of a will in the presence of witnesses was introduced into English law by Bracton, who "has implicitly copied the rule of the Civil Law."[181]

The Roman written will of Justinian's time was called threefold or tripartite (tripertitum[182]) because it united certain features of the ante-Justinian wills and Imperial testamentary legislation into one harmonious whole: (1) it retained from the

[176] This will is doubtless meant in a statute of Honorius and Arcadius because it necessitated five witnesses: *Cod. Theod.* 4, 4, 3. In 413 Honorius and Theodosius established a written will much less formal in character: *Code*, 6, 23, 19.

[177] Gaius, 2, 119–20; Ulpian, *Reg.* 28, 6; *Inst.* 2, 10, 2.

[178] Supra § 685. The praetors doubtless obtained the number *seven* (witnesses) by adding together all the persons who must be present to make a will by mancipatio: namely five witnesses, a libripens, and a familiae emptor.

[179] *Inst.* 2, 10, §§ 3–4; *Dig.* 28, 1, 21, 2; *Dig.* 28, 1, 20, 8; *Code*, 6, 23, 21, pr; *Code*, 6, 23, 12; *Dig.* 28, 1, 22, 3–4; *Dig.* 28, 1, 24; *Inst.* 2, 10, §§ 5, 12, and 13.

[180] See Robinson, *Elementary law*[2], § 137.

[181] *Commentaries*, vol. ii, p. 502.

[182] *Inst.* 2, 10, 3.

law for citizens (jus civile) the assembling of the witnesses and the doing of all the formalities of the will at one time[183]; (2) it retained from the praetorian law the employment of seven witnesses and the affixing of their names and seals[184]; (3) it retained from the Imperial statutes[185] the signature of the testator in the presence of the witnesses at the foot of the will,[186] and the signatures of the witnesses at the foot of the will.[187]

Forms of Roman wills in the Justinian law: (2) oral and other special kinds of wills. § 688 In the time of Justinian a person desiring to make a will could elect to execute either a written will or an oral will not in writing.[188] But certain classes of testators were privileged to make use of special forms of wills not permissible to every testator.

1. *Oral or nuncupative wills* (*per nuncupationem*[189]). Such wills were either private or public. A private oral or nuncupative will was one verbally made before seven witnesses.[190] Its origin is traceable to the ancient form of will provided by the old law for citizens (jus civile[191]). A public

[183] "Uno contextu actus": *Dig.* 28, 1, 21, 3. "Uno eodemque tempore" *Inst.* 2, 10, 3. See supra § 685; vol. i, § 40. But if the testator was ill from a contagious disease or such a disease was raging at the place where the testator lived, the witnesses did not have to be present together but could be summoned successively: *Code*, 6, 23, 8.

[184] See supra § 686.

[185] See for instance *Nov. Theodos.* 16, 1, 2–5; *Code*, 6, 21.

[186] Hence aptly called the "subscriptio": *Inst.* 2, 10, 3.

[187] *Id.* During the Empire the Romans had public registeries for the safeguarding of wills. The jurist Paulus states that after a will was copied it was sealed with an official seal and deposited in a public registery (*archivum*), so that if the copies of it were lost, fresh ones might be had from the original will: Paul. *Sent.* 4, 6, 1.

[188] *Inst.* 2, 10, 14. But the dumb, if able to write, must personally make a written will (supra § 687): *Code*, 6, 22, 10; see *Code*, 6, 23, 29, 1; supra § 680, footnote 153. It was also optional for *any* person to make a codicil or *informal* 'will': infra § 714.

[189] This expression is used in *Dig.* 28, 6, 20, 1.

[190] *Inst.* 2, 10, 14; *Code*, 6, 23, 21, 2; *Code*, 6, 23, 26; *Dig.* 28, 1, frag. 21, pr; frag. 25.

[191] *Inst.* 2, 10, 14. See supra § 685. It is also slightly reminiscent of the ancient Roman will *in procinctu*,—see supra § 684. The ancient meaning of "nuncupatio" is thus given by Gaius (2,104): "nuncupare est enim palam nominare."

(§ 688) oral will was one declared by a public act before a magistrate.[192] The oral will is still found in modern law, for instance such a will may be made in some of our American states which have not yet repealed the Roman doctrine of the Anglo-American Common Law permitting nuncupative wills.[193]

2. *Soldiers' and sailors' wills.* Soldiers and sailors in the active service of the State could make a valid will without employing the usual number of witnesses or any other formality.[194] This privilege was first given to soldiers by Julius Caesar; it was subsequently reaffirmed by the Emperors, particularly Titus, Domitian, and Nerva; and it was definitely incorporated into Roman testamentary law by Trajan.[195] Modern law also extends special testamentary favor to soldiers and sailors; for instance the law of Great Britain permits much less formality and a reduction of the number of necessary witnesses for the wills of soldiers and sailors.[196]

3. *Wills of the blind.* Any person afflicted with blindness could make a will before seven witnesses by openly declaring whom he wished to be heirs and legatees, together with the amount of their shares or legacies, and by instructing a notary (also present) to put the testator's wishes in writing — the whole transaction to be done in the presence of the witnesses and the will to be signed and sealed by the notary and the witnesses.[197]

4. *Wills of illiterate persons* (*rustici*). Anybody unable to read and write, living in the country, could make a will

[192] *Code*, 6, 23, 19. See Mackeldey (Dropsie), *Roman law*[14], § 690.

[193] See Schouler, *Wills*[2], §§ 360, 364, 365; *Prince* v. *Hazleton*, 20 Johns. 519; *Estate of Miller*, 47 Wash. 253; *Wiley's Estate*, 187 Pa. 82; *Lewis* v. *Aylott*, 45 Texas, 190; *Godfrey* v. *Smith*, 73 Neb. 756; *Gilles* v. *Willer*, 10 Ohio, 463; *Morgan* v. *Steves*, 78, Ill. 287; *Mitchell* v. *Stanton*, 139 S. W. 1034 (Texas); *Civil code* of Louisiana, 1576. In Louisiana law a "nuncupative" will is an open will made either by public act (dictation before a notary) or by act under private signature: *Civil code*, 1577–83.

[194] See Gaius, 2, 109; *Inst.* 2, 11; *Dig.* 37, 13, 1, 1 (sailors); *Dig.* 29, 1, frags. 21, 26, 38, and 42. And their wills were not subject to the lex Falcidia (infra § 698): *Dig.* 35, 2, 17.

[195] *Dig.* 29, 1, 1, pr.

[196] See 28 and 29 Victoria, ch. 72; Williams, *Inst. of Justinian*[2], p. 122.

[197] *Code*, 6, 22, 8; *Novels* of Leo VI, 69 (see supra vol. i, § 176, note).

before five witnesses if seven could not be found.[198] But the witnesses must be informed of the contents of the will, especially the name of the heir.[199] This form of will was not permissible to persons living in cities or towns of the Roman Empire.[200]

5. *Wills of parents benefiting solely those descendants who would have succeeded ab intestato.* Such wills could be very informally executed: a mere memorandum not witnessed, in which the date, the names and shares of the heirs were written by the testator,[201] was held to be sufficient.[202]

Appointment and designation of the testamentary heir or heirs. It has already been noticed that the essence of a Roman will was the appointment of the heir or heirs to continue the personality of the testator.[203] An heir might be designated — *instituted* was the technical word — unconditionally or conditionally.[204] During the Republic and the Early Empire it was necessary to designate the heir or heirs by a set form of words.[205] But soon after the death of Constantine the Great set forms of words ceased to be required in order to appoint an heir.[206] § 689

Calculation of a testamentary heir's share. The share of a Roman testamentary heir was calculated as follows. If the will did not designate it, the heirs shared equally.[207] But if it was designated by the will, the Romans employed this curious mode of division: every inheritance was considered as a unit (*as*) divisible into twelve parts (*unciae*), and each § 690

[198] *Code*, 6, 31, 2–3.

[199] *Code*, 6, 31, 4.

[200] *Code*, 6, 31, 1.

[201] The rest of the 'will' might validly be written by someone else.

[202] See *Nov.* 107, 1; *Code*, 3, 36, 16; *Code*, 3, 36, 26; Mackeldey (*Dropsie*), *Roman law*[14], § 700. See also *Nov.* 18, 7; *Nov.* 107, 2.

[203] Supra § 679.

[204] *Inst.* 2, 14, 9.

[205] Such as "Titius heres esto," "Titium heredem esse jubeo," etc.: Gaius, 2, 117; Ulpian, *Reg.* 21, 1.

[206] "Quibus libet confecta sententiis, vel quolibet loquendi genere formata institutio valeat, si modo per eam liquebit voluntatis intentio": *Code*, 6, 23, 15 (A.D. 339). And the name of the heir might be omitted, if he could be identified otherwise: *Dig.* 28, 5, 9, 8; *Inst.* 2, 20, 29.

[207] *Inst.* 2, 14, 4.

heir receives so many twelfths of the entire estate.[208] For instance if a Roman will designated eight as Titius' share and four as Maevius' share, Titius would receive eight-twelfths or two-thirds, and Maevius four-twelfths or one-third of the inheritance. If the testator in his distribution had designated specific shares amounting to more than twelve, the division was made on a basis of twenty-four as a unit; if more than twenty-four, on a basis of thirty-six as a unit.[209]

§ 691 **Plurality of testamentary heirs: right of accretion by survivorship (jus accrescendi).** If two or more persons were named heirs to an inheritance and one failed to take, his share went to the remaining heirs by virtue of his survivorship.[210] The reason of this is that each Roman heir, even if his share was designated by the will, was called to the *entire* inheritance. Anglo-American law is different: the testator would die partly intestate, unless there was a residuary legatee.

But the Roman law right of accretion by survivorship suffered a long eclipse from Augustus to Justinian. For centuries it was suspended by legislation[211] favoring marriage and attempting to increase the birthrate, which punished bachelors and widowers not remarrying by depriving them of the right to inherit any property, and which penalized childless married people by allowing them to take but a half of what they could otherwise have received. The property so escaping (called *caduca*) went either to heirs who had children, or, in default of such persons, to the State.[212] However, this legislation expressly excepted from its operation ascendants

[208] *Inst.* 2, 14, 5–8. See Bernard (Sherman), *Roman law*, § 752; Roby, *Roman private law*, vol. i, p. 200. The influence of this peculiar Roman mode of calculation or early Mohammedan law is noted supra vol. i, § 188, fourth footnote.

[209] *Inst.* 2, 14, 8.

[210] See Ulpian, *Reg.* 17 and 18; Paulus, *Sent.* 4, 8, § 26; *Dig.* 28, 5; *Dig.* 29, 2; *Code*, 6, 10 and 51; Colquhoun, *Roman law*, § 1274; Mackeldey (Dropsie), *Roman law*[14], § 752.

[211] *Lex Julia et Papia Poppaea* (A.D. 9).

[212] That is, to the *fiscus* or treasury department of the State: Gaius, 2, 144, 206; *Dig.* 50, 16, 142; *Girard, Textes*[3], p. 470; Mackeldey (Dropsie), *Roman law*[14], § 739. Compare supra § 677.

and descendants to the third degree:[213] these persons enjoyed the old right of accretion by survivorship.[214] But the evil of a diminishing birthrate during the Early Empire was never remedied by this legislation which endured for centuries. And with the advent of the Christian Emperors this long-standing policy was gradually abolished.[215] Finally Justinian swept away all remaining vestiges of the old Imperial legislation.[216] And thereafter the right of accretion by survivorship was restored to its pristine freedom.

Substitutions: (1) ordinary substitution (vulgaris substitutio). To obviate a succession becoming vacant through predecease, declination or incapacity of the heir, the Romans devised the expedient of substituting other persons to take whenever such contingencies occur. There were four kinds of substitution: ordinary, pupillary, quasi-pupillary, and fideicommissary. Ordinary substitution was a conditional appointment of persons to succeed in the second, third, etc., place in case the original appointee under the will did not take the inheritance.[217] § 692

(2) Pupillary substitution (pupillaris substitutio). This occurred when the head of a family (paterfamilias) appointed an heir to his minor child in case the child should die before puberty, — otherwise the child would die intestate.[218] § 693

(3) Quasi-pupillary substitution. This occurred when the head of a family (paterfamilias) appointed an heir to inherit the property of his insane descendant in power.[219] § 694

[213] As to lineal relationship, see supra § 464.

[214] Ulpian, *Reg.* 18; *Code*, 6, 51.

[215] See *Cod. Theod.* 8, 16, 1; *Code*, 8, 58, 1; *Cod. Theod.* 8, 17, 2–3; *Code*, 8, 58, 2; *Code*, 8, 59, 1.

[216] *Code*, 6, 51 (A.D. 534). See *Code*, 7, 6, 1; *Code*, 1, 17, const. 2, § 6b.

[217] See *Inst.* 2, 15; Gaius, 2, 174–8; Ulpian, *Reg.* 22, §§ 33–4; Paulus, *Sent.* 3, 4b, §§ 4–5; *Dig.* 28, 6; *Cod.* 6, 25.

[218] See *Inst.* 2, 16; Gaius, 2, 179–84; Ulpian, *Reg.* 23, §§ 7 and 9; *Dig.* 28, 6; *Code*, 6, 26. See supra §§ 506, 522.

[219] See *Inst.* 2, 16, 1; *Code*, 6, 26, 9; *Dig.* 28, 6, 43. This kind of substitution was described by Justinian as "ad exemplum pupillaris" (*Inst.* 2, 16, 1). It is now often termed by Civilians *substitutio quasi pupillaris* or *exemplaris* or *Justinianea* (see Mackeldey-Dropsie, *Roman law*[14], § 723).

§ 695 (4) **Fideicommissary substitution.** This was substitution made by means of a trust (fideicommissum).[220] All other forms of substitution[221] were conditioned upon the failure of the heir to enter upon an inheritance:[222] but a fideicommissary substitution could have no effect unless the heir took the property. Substitution by means of a trust was a very flexible instrument. Ordinarily the heir held the property for life, and at his death the property went to a second person also designated by the testator.[223] And it was possible to validly prolong almost without limit the order of succession by naming in the will or codicil more persons to take in turn the property as a whole or in part.[224] Furthermore, by a fideicommissary substitution it became also possible to erect a trust upon a trust.[225]

Really, substitutions by trust bequest were *oblique substitutions;* they could be used to limit estates from one person to another, and hand down property from generation to generation. Such substitutions were practised on the Continent of Europe in late medieval and early modern times to accumulate wealth in a few families. The vices of this system were freely exposed by the 18th century political writers, who aroused such antipathy in France against it that substitutions by means of a trust were forbidden after the Revolution of 1789. And this prohibition has been continued in modern French law,[226] whence it descended into the present Louisiana Civil Code.[227]

In the case of *McDonogh's Executors* v. *Murdock*[228] it was decided in 1853 by the Supreme Court of the United States

[220] Gaius, 2, 277; *Inst.* 2, 23, 11; Hunter, *Roman law*[4], pp. 822–4. As to *fideicommissa*, see infra "trusts," §§ 712 et seq.

[221] Supra §§ 692–4.

[222] See supra, § 665.

[223] Gaius, 2, 277; *Inst.* 2, 23, 11.

[224] See *Dig.* 36, 1, 28 (27), 16; and also the many cases given in Hunter, *Roman law*[4], p. 823; infra § 714.

[225] See *Dig.* 36, 1, 17 (16), §§ 16 and 7; Hunter, *Id.*

[226] *Civil code*, 896.

[227] Art. 1520. This code is the eldest child of the Code Napoleon: see supra vol. i, §§ 258, 264.

[228] 15 Howard Rep. 367.

that a testator's bequest of all the rest, residue, and remainder of his estate, present and future, to the cities of New Orleans and Baltimore forever, one-half to each, for the education of the poor in these cities, with a further provision that if they combine to violate his scheme or if they alienate the general estate, the property bequeathed shall be forfeited and then go to the states of Louisiana and Maryland, is not a substitution, which is prohibited by Louisiana law. The reason is, that in this case there is no disposing of property through a succession of legatees, which is the special feature of a substitution by trust bequest. The court held this case to be an English trust with a limitation over, and not a substitution.

Special rights of testamentary heirs: (1) disinherison (exheredatio). The general rights and responsibilities of all heirs, testamentary as well as ab intestato, have already been considered.[229] But heirs appointed by a will[230] had also certain special rights due to restrictions of the testamentary power. These were disinherison, reservation of definite portions of the testator's property for the heirs, and action to set aside a will as unduteous or unjust. § 696

No Roman will was valid, unless descendants in power[231] *not* appointed testamentary heirs were formally disinherited in the will itself.[232] In Ancient Roman law and particularly in the Law of the XII Tables, freedom to make a will was unrestricted[233]: the head of a family could disinherit all his children, if he saw fit. Later a reaction occurred which regarded restrictions on the freedom to make a will, as one

[229] See supra §§ 662–8.

[230] Every legally instituted heir could, if necessary, on petition to the praetor or proper magistrate, obtain his rightful share of the inheritance (**bonorum possessio secundum tabulas**): see *Inst.* 3, 9, 3; Mackeldey (Dropsie), *Roman law*[14], §§ 659, 725, 726, 728, 729, 731.

[231] See supra § 666.

[232] An heir not formally appointed or disinherited was called *praeteritus* (passed over or omitted): *Dig.* 28, 2, 3, §§ 2–4. And the praetor or proper magistrate on petition would give him a share in the inheritance (**bonorum possessio contra tabulas**): see *Inst.* 3, 9, 3; Mackeldey (Dropsie), *Roman law*[23], §§ 659, 713).

[233] *XII Tables*, 5, 3: "uti legassit suae rei, ita jus esto" (quoted in *Inst.* 2, 22, pr.).

pleases, to be in the interest of the children and preservative of family solidarity. The first restriction was the doctrine of disinherison[234]: namely if the testator desired to disinherit any child or grandchild in power, he must expressly exclude such descendant in the will,— otherwise the will would be void.[235]

Prior to Justinian, however, only sons had to be mentioned by name; daughters and grandchildren in power could be disinherited by a general clause of exclusion.[236] But Justinian required that daughters and grandchildren as well as sons must be expressly excluded by name in the will, if the testator desired to disinherit them.[237] Finally, by extensions of the doctrine of disinherison made by the praetors and certain statutes,[238] it became possible to also disinherit emancipated children or even posthumous children by expressly mentioning these in the will. And such was also the law of Justinian.[239]

From Roman law is the origin of the common English and American notion of the necessity of "cutting off the heir with a shilling"[240] or "with a dollar." And the safer Anglo-American practice in disinheriting an heir is to expressly leave to him or her a little something, usually a small sum of money.

§ 697 **Special rights of testamentary heirs: (2) reservation of definite portions of the testator's property for the heirs. 1. The legal share or legitime (legitima pars, legitima portio) — commonly called the fourth (quarta), prior to its alteration by Justinian.** Finally, the right itself to freely dispose of

[234] This word is used in the *Civil code* of Louisiana, for instance art. 1617.

[235] Gaius, 2, 123; *Inst.* 2, 13, pr.

[236] Gaius, 2, 123; *Inst.* 2, 13, pr. An illustration of disinheriting a son was: "Titius filius meus exheres esto" (Gaius, 2, 127). But to disinherit a daughter it was sufficient to use the general clause "Ceteri exheredes sunto" (Gaius, 2, 128). See supra § 506.

[237] "Simile jus et in filiis et in filiabus et in ceteris descendentibus per virilem sexum personis non solum natis, sed etiam postumis introduxit, ut omnes, sive sui sive emancipati sunt, et nominatim exheredentur," — *Inst.* 2, 13, 5; *Code*, 6, 28, 4.

[238] Such as the *lex Junia Velleia* or *Vellaea* (A. D. 277) as to posthumous children born after the making of a will: Gaius, 2, 139; *Inst.* 2, 13, 1; *Dig.* 28, 2, 29, §§ 11–13. See also *Dig.* 28, 2, 29, §§ 14–15.

[239] *Inst.* 2, 13, 5 (quoted second note above).

[240] Williams, *Inst. of Justinian*[2], p. 125.

property by will became curtailed, and a Roman testator must (§697)
leave to the disinherited heir or even to the instituted heir a definite portion of his property: if he did not do so, the aggrieved heir could obtain this portion after the testator's death.

The legal share, or "birthright portion,"[241] consisted of a part of what an heir entitled to such legal share would have received if the testator had died intestate. And the testator could not deprive an heir of his legal share,[242] unless the heir had done something for which the testator might lawfully disinherit him without leaving him any property.[243] The heirs entitled to the legitime[244] or legal share were primarily the testator's children and grandchildren who would have inherited from him ab intestato,[245] but if there were no descendants, then the testator's ascendants and brothers and sisters who would have inherited from him ab intestato.[246]

Until changed by Justinian, the *amount* of the Roman legitime (which had become definitely fixed by judicial practice and decisions early during the Empire[247]) was one-fourth of

[241] Dropsie's apt phrase: Mackeldey (Dropsie), *Roman law*[14], §§ 706 et seq.

[242] In the ante-Justinian law, if the testator left an heir nothing or *less* than his statutory share, the heir could bring a *querela inofficiosi testamenti* (infra § 701) to obtain his legal share or what was still due him (*Nov. Theod.* 22, 1). But Justinian changed this by enacting (*Code*, 3, 28, 30–36; *Inst.* 2, 18, 3) that thereafter an heir could bring *querela inofficiosi testamenti* only if the testator had given him nothing; if he had given him something, then the heir could not break the will but must bring against the other heir or heirs an action for the amount necessary to make his portion equal to the requisite legal share (*actio ad supplendum.*)

[243] As to the lawful grounds for disinheriting heirs, see *Nov.* 115, 3 and 4; *Nov.* 22, 47, pr.; *Code*, 1, 5, 13; Hunter, *Roman law*[4], pp. 783–4; *Mackeldey* (Dropsie), *Roman law*[14], § 712. With the Roman law compare the just causes for disinhersion recognized by the *Civil code* of Louisiana, 1621–3.

[244] This word is used in the Louisiana civil code (for instance art. 1617), and in Hunter, *Roman law*[4], p. 780.

[245] *Inst.* 2, 18, pr. and § 1; *Inst.* 2, 13, 5; Mackeldey (Dropsie), *Roman law*[14], § 707.

[246] *Inst.* 2, 18, 1; Mackeldey, *Id.* But the brothers and sisters could claim the legitime only when the testator had made an infamous person (supra § 453) his heir: *Inst.* 2, 18, 1.

[247] Traces of the legitima pars, a rule of *customary* Roman law origin, can be found in the time of Augustus (Seneca, *Controv.* 4, 28); at any rate

(§ 697) what an heir of the testator would have inherited from him ab intestato.[248] And this meant one-fourth of the *intestate* share.[249] Justinian increased this centuries-old fourth, in the case of children, to one-third if the testator left four children or less, and to one-half if the testator left more than four children.[250]

The Roman policy of not permitting a testator to dispose of all his property as he pleases, has exerted considerable influence on certain modern systems of law, for instance the French and the Louisiana. Significant of Roman influence are the following excerpts from the Louisiana Civil Code.[251] "*Of the disposable portion and the legitime.* Donations *inter vivos*[252] or *mortis causa*[253] *cannot exceed* two-thirds of the property of the disposer, if he leaves at his decease, a legitimate child; one-half, if he leaves two children; and one-third if he leaves three or a greater number. Under the name of *children* are included descendants of whatever degree they be.[254] . . . Donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the

the legitime was well known in the second half of the first century A. D. (Pliny, *Epist.* 5, 1; Petit, *Droit romain*[5], § 579, note 1). Its introduction into Roman law was due to the influence of the old court of the *centumviri* which had jurisdiction of wills ("testamentorum ruptorum et ratorum," — Cicero, *De* orat., 1, 38).

[248] *Dig.* 5, 2, frag. 8, § 6; frag. 25, pr; *Inst.* 2, 18, §§ 6–7; *Cod. Theod.* 2, 19, 4; Paulus, *Sent.* 4, 5, 6; *Vat. Frag.* 271. This "fourth" seems to have been fixed by analogy to the "Falcidian fourth" which was reserved for the instituted heir as against legatees (infra § 698). An adoptive father did not have to leave a fourth, legitima pars, to a son adopted under the SC. Afinianum (repealed by Justinian): *Inst.* 3, 1, 14; *Code*, 8, 47, 10.

[249] *Inst.* 2, 18, 7. For instance, if there were four children of the testator, each child would have received one-fourth ab intestato, and would have been entitled to one-fourth of one-fourth or *one-sixteenth* as legitime sufficient to prevent a *querela inofficiosi testamenti* (infra § 701).

[250] *Nov.* 18, ch. 1 (A. D. 536). This repealed all inconsistent portions of *Inst.* 2, 18 (A. D. 533). The new law was more beneficial to an heir than the old: for instance if a testator left five children, each would have been entitled, according to Justinian's statute, to one-fifth of one-half or *one-tenth* as legitime (instead of one-fourth of one-fifth or *one twentieth*, in the ante-Justinian law). But this mode of computing the extent of the Justinian legitime is disputed: Mackeldey (Dropsie), *Roman law*[14], § 708.

[251] Saunders' edition and text (1909).

[252] Explained supra § 658.

[253] Explained supra § 660.

[254] Art. 1493.

property, if the disposer, having no children, leave a father or mother or both.[255] In the cases prescribed by the two last preceding articles, the heirs are called *forced heirs*, because the donor cannot deprive them of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them.[256] *Forced heirs* may be deprived of their ligitime or legal portion . . . by the effect of disinherison by the testator for just cause.[257] . . . The disinherison must be made by name and expressly, and for a just cause, otherwise it is null."[258]

§ 698

2. **The Falcidian fourth (quarta Falcidia).** Another definite portion of the testator's property reserved for the heirs was the Falcidian fourth.[259] Every Roman testator was prohibited by law from making legacies of more than three-fourths of his property.[260] In other words, one-fourth of the inheritance must go to the appointed heir or heirs as against the legatees: if the testator omitted this provision, then the heirs could retain for themselves one-fourth of the net assets of the estate, and reduce the legacies proportionally.[261]

But Justinian profoundly modified the centuries-old right to the Falcidian fourth: only those heirs who made an inventory were entitled to take it[262]; and furthermore any heir might be deprived of all right to the Falcidian fourth by the testator himself.[263]

[255] Art. 1494.

[256] Art. 1495.

[257] Art. 1617.

[258] Art. 1619. Compare this article with supra § 696.

[259] The Romans called it simply "Falcidia" or "quarta".

[260] Gaius, 2, 227; *Inst.* 2, 22, pr; *Dig.* 35, 2, 1, pr; *Nov.* 1, 2, pr. See supra § 660. The lex Falcidia was a plebiscitum passed 40 B.C. Legacies are considered infra §§ 706 et seq.

[261] *Inst.* 2, 22, pr. and § 3; *Dig.* 35, 2, 72. But an heir was not entitled to his legitime or legal share (supra § 697) in addition to the Falcidian fourth: *Dig.* 31, 87, 3; *Code*, 3, 28, 36, §§ 1 and 1a. On the subject of the Falcidian fourth, see Mackeldey (Dropsie), *Roman law*[14], §§ 771–5.

[262] *Code*, 6, 30, 22, § 14c; *Nov.* 1, 2, §2. See supra § 664.

[263] "Si expresse declaraverit nolle se heredem retinere Falcidiam, necesse est testatoris voluntatem obtinere": *Nov.* 1, 2, § 2 (A. D. 535). Testators had no such power in Roman law prior to this statute of Justinian: *Dig.* 35, 2, frag. 15, § 1; frag. 27; *Dig.* 30, 81, § 4; *Code*, 6, 50, 11 and 18. As

§ 699 3. **The Pegasian fourth** (**quarta Pegasiana**). Another definite portion of the testator's property reserved for the heir was the Pegasian fourth.[264] This was but an extension to testamentary trust (fideicommissa[265]) of the doctrine of reserving one-fourth of an inheritance for the heir as against the legatees: that is to say, no testator could dispose of more than three-fourths of his property in testamentary trusts — one-fourth of the entire estate must go to the heir, who could retain it from the property handed over to the beneficiary of the trust-bequest. And Justinian enacted that in every case the liabilities of the testator should be divided between the heir and the beneficiary of the trust in proportion to their respective shares of the inheritance.[266]

The purpose of the Pegasian fourth as to testamentary trusts was the same as that of the Falcidian fourth as to legacies: namely to prevent a testator from consuming his entire estate in gifts and so leave his heir nothing. For centuries in Roman law the most a decedent could give away by legacies or trusts was only three-fourths of his property[267]: one-fourth must descend to the heirs. Roman law justly and wisely looked upon with disfavor and regarded as pernicious to the welfare of the family all testamentary dispositions of property which beggar children or parents in favor of strangers to the blood. And the Roman doctrine of limiting the disposable part of a man's property by reserving a share thereof for the heirs is also a feature of many modern

to the Falcidian fourth in modern law, see for instance the *Civil code* of Louisiana, 1616, which expressly abolishes it.

[264] Gaius, 2, 254–8; *Inst.* 2, 23, 5 and 6. This was provided for in the senatusconsultum Pegasianum passed A. D. 70–79 during the reign of Vespasian.

[265] Considered infra §§ 712 et seq.

[266] *Inst.* 2, 23, 7. See infra § 712. This benefit of the division of liabilities of the inheritance was given originally by the SC. Trebellianum, enacted A. D. 56 in the reign of Nero: Paulus, *Sent.* 4, 3, 2; *Id.* 4, 2. As to the Trebellianic provision in modern law, it is expressly abolished in the *Civil code* of Louisiana, 1520.

[267] See however Justinian's legislation as to the Falcidian fourth, supra § 698.

legal systems, — for instance the French, Italian, Spanish, German, and Louisiana law.[268]

4. The Antonine fourth (quarta Antonina, quarta Divi Pii). If an adrogated child under puberty was emancipated or was unjustly disinherited,[269] not only did he have a right to recover all his property brought to the adoptive father, but also after the decease of the adoptive father he could claim one-fourth of the adoptive father's property.[270] This Antonine fourth was introduced by a statute of the Emperor Antoninus Pius.[271] § 700

Special rights of testamentary heirs: (3) action to set aside a will as unduteous or inofficious (querela inofficiosi testamenti). Toward the beginning of the Empire[272] arose the action by which an heir,[273] for whom the testator did not provide as the law required,[274] could break the will as unjust[275] and obtain what he would have received ab intestato — in other words the effect of the action was to substitute intestate succession.[276] This action was based on § 701

[268] The disposable part ranges from one-third to two-thirds: see for instance the *Civil code* of France, 913; Spain, 806; Italy, 805; Germany, 2303; Louisiana, 1493–5, 1617 (quoted supra § 697).

[269] See supra §§ 467, 501, 513, 696, 697, note.

[270] *Inst.* 1, 11, 3; *Dig.* 38, 5, 13; *Dig.* 5, 2, 8, 15. See *Dig.* 1, 7, 15, 2–3.

[271] *Dig.* 38, 5, 13. He reigned A.D. 138–161. As to this Antonine fourth see also Roby, *Roman private law*, vol. i, p. 61; Bernard (Sherman), *Roman law*, § 311; Mackeldey (Dropsie), *Roman law*[14], § 594. Bernard's view that the adrogatus' fourth was one-fourth of his *intestate* share (i.e., equivalent to the legitime, supra § 697) although logically sound, is disputable.

[272] The date is not prior to the commencement of the Empire: Girard, *Manuel de droit romain*[5], p. 862, note 2. Gaius, who is the earliest textual source, cites no laws anterior to Trajan (*Dig.* 5, 3, 7). See also Pliny, *Ep.* 5, 1, 9; Cicero, *In Verr.*, 2, 1, 42 and 107.

[273] Primarily a *suus heres* (*Inst.* 2, 18, pr.; see supra § 666), but sometimes an ascendant or a brother or sister, could bring this action (*Inst.* 2, 18, 1; see supra § 463).

[274] See supra § 697.

[275] "Inofficiosum" (*Inst.* 2, 18), which means *contrary to the testator's duty* or *unduteous* or *inofficious* (this last word is used in the Louisiana Civil code, art. 3556, 16). Paulus' famous expression is "non ex officio pietatis conscriptum" (*Sent.* 4, 5, 1).

[276] See *Inst.* 2, 18; *Inst.* 3, 1, 14; Mackeldey (Dropsie), *Roman law*[14], § 716; Moyle, *Inst. of Justinian*, vol. i, 5th ed., p. 279; see supra §§ 670 et seq.

the assumption that the testator was not of sound mind when he made the will,[277] and that consequently his will ought to be treated as if he did not enjoy his full reason.

§ 702 **Invalidation of wills.** In both Roman and modern law, wills become invalidated from many causes: either the will is void or voidable. The general consequence of the invalidity of wills is that succession ab intestato takes place. A void will is one that is fundamentally defective ab initio, being either bad in form or lacking some essential requisite.[278]

A voidable will is one that is valid ab initio, but becomes inoperative owing to the happening of some event after it is made.[279] Instances of voidable wills are many. A will is revoked by the making of a subsequent will.[280] In Roman law a will was revoked by the birth of a child to the testator or when the testator received a family heir in any manner.[281] And it is interesting to note that, according to the Anglo-American Common Law, a will is revoked by marriage and birth of a child.[282] In Roman law a will became ineffectual by the testator's loss of status or civil personality at the time of his death.[283] A Roman will might become annulled because it was unduteous or unjust to the heirs.[284] A Roman will failed whenever the heir was unable or declined to accept the inheritance.[285]

[277] This allegation was not intended to mean that the testator was actually insane, but that the will although rightly made was contrary to the duty of natural affection: *Inst.* 2, 18, pr.

[278] ROMAN LAW: *Dig.* 28, 3, 1; supra § 680; Mackeldey (Dropsie), *Roman law*[14], § 724. MODERN LAW: Schouler, *Wills*[2], §§ 18, 65, 252 et seq. (American law).

[279] ROMAN LAW: *Dig.* 28, 3, 1; *Inst.* 2, 17; Mackeldey, *Id.* §§ 726–9. MODERN LAW: Schouler, *Wills*,[2] §§ 10, 18 et seq., 46, 380 et seq.

[280] ROMAN LAW: Gaius, 2, 144; *Inst.* 2, 17, 2. The invalidated will was called "ruptum". MODERN LAW: Schouler, *Wills*[2], §§ 404 et seq.

[281] Gaius, 2, 138–45; Ulpian, *Reg.* 23, 2 and 3; *Inst.* 2, 17, 1; *Inst.* 2, 13, 1 and 2. This included *sui heredes* (supra § 666) born in wedlock, posthumous heirs, persons made heirs by legitimation or adoption.

[282] Blackstone, *Comm.* vol. ii, p. 502; Schouler, *Wills*[2], §§ 424–5.

[283] Gaius, 2, 145; *Inst.* 2, 17, 4. See supra §§ 431–2, 437 (jus postliminium and lex Cornelia). Such an invalidated will was called "irritum".

[284] *Inst.* 2, 18; *Dig.* 5, 2, 6; Paulus, *Sent.* 4, 5; supra § 701. Such a will was termed "inofficiosum".

[285] *Dig.* 50, 17, 181; *Inst.* 3, 1, pr. and § 7; *Dig.* 26, 2, 9. See supra §§ 666–7, 682. Such a will was termed "destitutum".

Survival of the Roman law of testate or testamentary succession in modern law. The Roman conception of a will, its requisites, the setting aside of duly executed wills, and many of the Roman principles of legacies and trusts constitute the heritage of the modern law of testamentary succession throughout the world. In modern law, as in Roman law, succession by will is a recognized mode of acquiring ownership.[286] The Roman character of much of Anglo-American testamentary law is due to the influence of the English ecclesiastical courts, which began to obtain jurisdiction over wills certainly as early as the time of Glanville[287] in the latter half of the 12th century. Naturally the church courts exercised this jurisdiction, which continued in England for many centuries,[288] along the lines of the Roman and Canon Laws.[289] Or, as Lord Hale said, "where the Canon Law is silent, the Civil Law is taken as a director especially in points of exposition and determination touching wills and legacies." [290] § 703

(2) Legacies (Legata) and Trusts (Fideicommissa)[291]

Justinian fused legacies and trusts. Prior to Justinian, legacies and trust-bequests existed independently side by side in Roman law. But Justinian fused the two, and enacted that a legacy should be construed as liberally as a trust and that a trust should be enforced as fully as a legacy.[292] Furthermore to every legatee and to every trust beneficiary Justinian gave a lien on the testator's immovables for the payment of the legacy and the trust-bequest.[293] § 704

[286] See for instance the *Civil code* of California, 1000.

[287] Glanville, vii, 8. This jurisdiction is found also in Magna Charta, §27.

[288] See supra vol. i, §§ 380, 400, 401, note. The ancient ecclesiastical courts in England were terminated in 1857 (20 and 21 Victoria, ch. 77).

[289] See supra vol. i, §§ 215, 225–30.

[290] Hale, *Common law*, p. 28. See infra § 710.

[291] There is no one English word exactly translating fideicommissum; "trust" is accurate, except that in American and English law the term trust includes also a trust made *inter vivos* (unknown to Roman law): hence the English expressions "*trust-bequest*" or "*testamentary trust*" are clearer translations of the Roman fideicommissum.

[292] *Inst.* 2, 20, 3; *Code*, 6, 43, 2.

[293] *Code*, 6, 43, 1, 1. See supra § 624.

§ 705 **The vesting of legacies and trusts.** Roman law drew a sharp distinction between the contingent right (*dies cedit* [294]) to a legacy or trust-bequest and the actual vesting (*dies venit* [295]) of the same. Until the inheritance was accepted [296] by the heir, the right of the legatee or trust beneficiary was generally contingent and not legally demandable or enforceable.[297] And if the heir refused to accept, the legacies and trusts given in the will lapsed.[298] But as soon as the heir accepted the inheritance, the legacies and trust-bequests became payable — that is, these actually vested [299] in the legatees and trust beneficiaries, who could transmit their rights to their own heirs.

A. LEGACIES (LEGATA)

§ 706 **Legacy defined.** According to the Institutes of Justinian, "a legacy is a kind of gift left by a deceased person." [300] The definition is correct if it is understood that the gift is one made in a will or a codicil. A Roman legatee, unlike a Roman heir, was not a continuator of the personality of the decedent,

[294] "Cedere diem significat incipere debere pecuniam": *Dig.* 50, 16, 213.

[295] "Venire diem significat eum diem venisse cum jam peti possit": *Dig.* 50, 16, 213.

[296] See supra § 665.

[297] If the legacy or trust was unconditional, the contingent right to it (*dies cedit*) accrued at the death of the testator: Ulpian, *Reg.* 24, 31. But if the legacy or trust was conditional, the contingent right to it accrued upon the fulfillment of the condition: Ulpian, *Reg.* 24, 31; *Code*, 6, 51, 1, 1c. If the condition consisted of the commission of some act which a legatee or heir must not do during his life, then the legatee or heir could immediately obtain the legacy by giving security (a surety) against the commission of the act; and this suretyship was called **cautio Muciana** (probably from the name of one of the jurists, Scaevola — supra, vol. i, § 53 — who invented it): *Dig.* 35, 1, frag. 7, pr.; frag. 72, pr.; frag. 79, 3; Krueger, *Die Cautio Muciana* (in *Mélanges P. F. Girard*, vol. ii, pp. 1–34, Paris, 1912). See *Vat. Frag.* 60, where the contingent right to a legacy accrued *after* the heir had accepted an inheritance.

[298] See infra § 708. But legacies or trusts given in a codicil (the informal Roman will — see infra § 714) were not affected by the heir's refusal.

[299] *Dig.* 31, 32, pr; frag. 45, 1.

[300] *Inst.* 2, 20, 1.

for legacy was a mode of acquiring ownership of *single* things.[301] A legacy might be left to any natural or artificial person. A municipal corporation was given capacity during the Early Empire[302] to receive bequests.[303] And a municipal corporation has this power in modern law.[304]

Forms of legacies. In the Roman law prior to Nero there § 707
were several forms of legacies[305]; and certain precise expressions must be used by testators in order to render their bequests effectual.[306] But in Nero's reign all forms of legacies were made of equal effect.[307] In the 4th century soon after the death of Constantine the Great the necessity of using set forms of words was abolished by an Imperial statute.[308] And Justinian made all legacies to be of but one nature and form irrespective of the actual words of the bequests.[309]

Plurality of legatees; right of accretion by survivorship in § 708
cases of joint legacies; lapsed legacies. In both Roman and Anglo-American law, a legacy to husband and wife results in their taking separately.[310] In both Roman and modern law when a legatee dies before the testator, his legacy lapses — is

[301] *Inst.* 2, 9, 6. See supra §§ 661–2; Ulpian, *Reg.* 25, 15. But, although a testator ould not bequeath all his property to a legatee (supra § 698), he could make a legacy of part of his *universal* succession (*legatum partiarium* see *Dig.* 50, 16, 164, 1; *Dig.* 30, 26, 2). But a testator could bequeath an entire inheritance derived from someone else: *Dig.* 32, 29, 2; *Dig.* 31, 88, 2.

[302] See supra § 551.

[303] *Id.*

[304] See for instance *McDonogh's Executors* v. *Murdock*, 15 Howard (U. S. Supreme Court Rep.), p. 367.

[305] There were four forms of legacies: *per vindicationem*, *per damnationem*, *sinendi modo*, and *per praeceptionem*; see Gaius, 2, §§ 192 et seq. Nero reigned A. D. 54–68.

[306] *Id.*

[307] Gaius, 2, 197; Ulpian, *Reg.* 24, 11.

[308] *Code*, 6, 37, 21 (A. D. 339, Constantine II).

[309] *Inst.* 2, 20, 2; *Code*, 6, 43, 1, pr.

[310] See Williams, *Inst. of Justinian*[2], p. 139; Schouler, *Wills*[2], § 566. But if a devise or bequest was to several persons consisting of husband and wife and others, the Common Law rule is that the husband and wife together took a single share and not one share each separately.

extinguished and falls back into the mass of the estate to benefit the person entitled to it.[311]

In both Roman and modern law there is no accretion by survivorship (*jus accrescendi*) in favor of legatees, unless they are *joint* legatees for the same legacy — in such a case the lapsed share goes to the surviving colegatees.[312] This Roman right of joint legatees to accretion by survivorship was considerably interfered with during the Early Empire by Imperial Statutes penalizing celibacy and childlessness.[313] But Justinian restored the right of accretion to all its fullness.[314]

§ 709 **Restraints placed by the testator on the rights of legatees. Revocation of legacies.** In both Roman and modern law a testator cannot forbid the legatee to alienate his legacy.[315] But a testator has the power, in both Roman and modern law, to define the use and destination of the property bequeathed.[316] In both Roman and modern law a legacy may be revoked either expressly or by the destruction of the property bequeathed.[317]

§ 710 **Roman rules as to the construction of legacies, and their survival in English and American law.** The law of legacies, whether Roman or modern, is one of details. But the following are important instances as to what constituted a valid legacy in Roman law. 1. *The regula Catoniana.* A legacy invalid at the time of making a will was also invalid whenever the testator

[311] ROMAN LAW: As to a *legatum extinctum*, see *Code*, 6, 51, 1, §§ 2, 4, and 7; Colquhoun, *Roman law*, § 1178. In Roman law the heirs obtained lapsed legacies. MODERN LAW: Schouler, *Wills*[2], §§ 519, 521. In Anglo-American law the residuary legatee, or if there is none the heirs ab intestato, obtain lapsed legacies.

[312] ROMAN LAW: Gaius, 2, 199. See Gaius, 2, 205. MODERN LAW: *Civil code* of Louisiana, 1570; France, 1044; Schouler, *Wills*[2], § 566.

[313] Ulpian, Reg. 17, 1 and 18, 1; Gaius, 2, 206; *Dig.* 50, 16, 142; supra § 691.

[314] *Code*, 6, 51, 1c.

[315] ROMAN LAW: *Dig.* 30, 114, 14. See Hunter, *Roman law*[4], pp. 945–6 for Roman cases of legacies in restraint of the legatee's liberty or right of alienation. MODERN LAW: Schouler, *Wills*[2], §§ 601–2.

[316] ROMAN LAW: See Hunter, *Id.* MODERN LAW: See *McDonogh's Executors* v. *Murdock*, 15 Howard (U. S. Supreme Court Rep.), 367.

[317] ROMAN LAW: *Inst.* 2, 21, pr.; *Dig.* 30, 26, 1; Hunter, *Roman law*[4], pp. 949–52. MODERN LAW: Schouler, *Wills*[2], §§ 397, 406, 417, 427.

died.[318] 2. *Legacy of a debt.* A testator could bequeath a debt (§ 710) due him as a legacy.[319] Furthermore a testator could bequeath to a debtor the amount of the debt owned by the debtor.[320] 3. *Legacy with an impossible condition.* A legacy with an impossible condition was treated as valid, the condition being totally disregarded.[321] Modern law is the same as the Roman.[322]

4. *Mistake in a legacy.* An error in names or a false description did not render the legacy ipso facto void, provided that a part of the description was sufficient to identify the person or object.[323] But if the identification demanded the entire description, the legacy failed if part of the description was erroneous.[324] The Anglo-American law is the same as the Roman as to mistake in a legacy.[325] Moreover in Roman law a mistaken inducement for the legacy did not invalidate it.[326] But the legacy of another's property by mistake was void.[327] And yet if the testator knew that the property belonged to a third person, the legacy in itself was valid.[328]

The English and American rules of the construction of legacies and documents are largely of Roman origin.[329] Having no original testamentary jurisdiction, the Court of Chancery naturally adopted the rules of the ecclesiastical courts which

[318] *Dig.* 34, 7, 1, pr.; *Dig.* 30, 41, § 2. As to cases where this rule did not apply, see *Dig.* 35, 1, 98; *Dig.* 34, 7, 3; Hunter, *Roman law*[4], p. 949. The regula Catoniana was invented by the jurist Cato the Younger (supra vol. i, § 53).

[319] *Inst.* 2, 20, 21.

[320] *Inst.* 2, 20, 14–15; *Dig.* 37, 7, 4; *Dig.* 30, 84, 6. The legacy was valid if it was at all advantageous to the debtor-legatee.

[321] Gaius, 3, 98; Hunter, *Roman law*[4], p. 591.

[322] See for instance *McDonogh's Ex.* v. *Murdock*, 15 Howard (U. S. Supreme Court), 367; *Civil code* of France, 900; Louisiana, 1519.

[323] *Inst.* 2, 20, 30; *Dig.* 33, 4, 1, 7; Hunter, *Roman law*[4], p. 924. This was called a "falsa demonstratio" (*Inst.* 2, 20, 30).

[324] Hunter, *Id.*, and cases cited.

[325] See Williams, *Inst. of Justinian*[2], p. 145; Schouler, *Wills*[2], § 516, 519.

[326] *Inst.* 2, 20, 31.

[327] *Inst.* 2, 20, 4; Gaius, 2, 202.

[328] *Inst.* 2, 20, 4. But of course the heir might not be able to secure the property, if it was a specific object.

[329] Spence, *Equity*, vol. i, pp. 518, 523, 526.

were those of the Roman law as introduced into the Canon Law.[330]

Instances of this adoption are many. In one case[331] Civilians actually gave opinions as to the admissibility of evidence in a case of legacies, and instructed the vice-chancellor as to the rules of practice of the ecclesiastical courts. In another case[332] as to the cumulativeness of legacies, Roman law citations were introduced as controlling authorities; and for the court Lord Thurlow said: "No argument can be drawn in the present case from internal evidence; we must therefore refer to the rules of the Civil Law." In another case[333] to interpret the language of an alleged trust, resort was had to the Roman law.

It was also Lord Thurlow who, in a case of legacies for public uses,[334] declared that the English law "had proceeded upon notions adopted from the Roman . . . laws, which are very favorable to charities, that legacies given to public uses not ascertained shall be applied to some proper object." Spence's remark that "probably the same law as to legacies has continued in England from the time of Agricola to the present day"[335] is largely true with only one exception, — it is not applicable to English law between the Anglo-Saxon conquest and the Norman conquest.[336]

§ 711 **Justinian fused gifts mortis causa with legacies.** Justinian made an addition to the law of legacies: he merged gifts mortis causa with legacies, and made them subject to nearly all the rules of legacies.[337] Gifts mortis causa have been merged in legacies by some modern legal systems, for instance Louisiana law which provides that "no disposition mortis causa shall henceforth be made otherwise than by last will or testament. Every other form is abrogated."[338]

[330] See supra § 703.

[331] *Hurst* v. *Beach*, 5 Mad. Rep. 251, 357, 360.

[332] Cited in *Ridges* v. *Morrison*, 1 Brown Chan. Cases, 389.

[333] *Knight* v. *Knight*, 3 Beav. 161, 172.

[334] *White* v. *White*, 1 Br. Chan. Cases, 15. So as to charitable trusts, — see Spence, *Equity*, vol. i, p. 587.

[335] *Equity*, vol. i, p. 523, note.

[336] See supra vol. i, § 367.

[337] *Inst.* 2, 7, 1; *Code*, 8, 57, 4. As to gifts mortis causa, see supra § 660.

[338] *Civil code*, 1570.

B. TRUSTS (FIDEICOMMISSA)

Trust defined. The Roman trust was a bequest made § 712
either in a will or a codicil and intrusted, as by its name *fideicommissum*,[339] to the good faith of an heir or legatee who was charged with carrying it into effect. By a trust it was possible to hand over, through the instrumentality of the trustee (*heres fiduciarius*[340]), a part or even the whole of a decedent's property to a third person as a beneficiary (*fideicommissarius*[341]). But a fideicommissum was a mode of acquiring ownership of *single things*,[342] and the beneficiary was not a continuator of the decedent's personality nor a universal successor.[343]

Trusts were first enforced by Augustus, and thus were introduced into Roman law.[344] Justinian merged trust-bequests with legacies,[345] and he also divided the responsibility for the payment of the debts of the creator of the trust proportionally between the heir and the beneficiary.[346]

Influence of fideicommissa on English law; differences between the Roman and the English trust. § 713
The Roman trust is the ancestor of the English trust. The clerical chancellors undoubtedly formulated and developed their conceptions of uses and trusts from the Roman fideicommissa.[347] The English *uses* which were employed by the clergy to defeat the statute of mortmain, and by the laity (especially during the Wars of the Roses) to avoid forfeiture of land for treason, were akin to the Roman fideicommissa. The Court of Chancery in the first quarter of the 15th century began to have

[339] English translations of this word are given and discussed in the footnote to the heading of sub-chapter (2), which immediately precedes § 704.

[340] Used in *Dig.* 36, 1, frags. 48 and 69, 3.

[341] *Inst.* 2, 24, pr.; *Inst.* 2, 23, pr. (*fideicom. hereditates*). The "fideicommissarius" corresponded to the Anglo-American *cestui que trust* or beneficiary of a trust.

[342] *Inst.* 2, 9, 6.

[343] See supra §§ 661–2.

[344] *Inst.* 2, 23, §§ 1 and 12.

[345] *Inst.* 2, 20, 3; supra § 704.

[346] *Inst.* 2, 23, 7; supra § 699.

[347] Scrutton, *Rom. law in England*, p. 156.

jurisdiction over uses, in the reign of Henry V.[348] A century later in the reign of Henry VIII when the Statute of Uses made the person with the use the actual legal owner of the land, the chancellors created *trusts* by the device of enforcing "a use of a use," upon which the Statute of Uses could not operate.[349]

The following constitute the principal differences between the Roman fideicommissum and the English trust. 1. A fideicommissum could be created only by will or codicil, while an English trust may be created not only in these ways but also by agreement or conveyance inter vivos. In other words, the Roman trust was strictly of testamentary or codicillary origin. 2. In Roman law "there was no permanent relation of trustee and beneficiary as in England"[350] and the United States. 3. In Roman (but not in English) law, unless there was an heir there could be no enforcement of a trust bequest.

4. The purpose of introducing trusts into Roman law seems to have been to enable lands to be perpetually entailed,[351] or to enable persons to take indirectly who could not be appointed heirs; while trusts were introduced into English law to defraud creditors, or to avoid attainder, or to devise an estate, or to secure an influential person to hold the legal title.[352]

(3) Codicils (Codicilli)

§ 714 **Codicil defined.** A codicil was the *informal* Roman 'will'. It was a new mode of testate succession originating in the time of Augustus, and it was greatly favored by him and his successors.[353] While the making of the formal will (testamentum)

[348] Scrutton, *Id.* This king reigned A.D. 1413–22.

[349] Scrutton, *Id.* Henry VIII reigned 1509–47.

[350] Williams, *Inst. of Justinian*[2], p. 148.

[351] "Integras manere ipsis et filiis nepotibusque in sempiternum"; *Dig.* 31, 88, 15. But Justinian limited entails to four generations: see *Novel.* 159, 2. As to perpetuity in substitutions (supra § 695), see Moyle, *Inst. of Justinian*, vol. i, 5th ed. p. 275, commentary on § 9.

[352] Spence, *Equity*. vol. i, pp. 21, 435, 440; Williams, *Inst. of Justinian*[2], p. 149.

[353] *Inst.* 2, 25, pr. On the subject of codicils see Hunter, *Roman law*[4], pp. 825–30; Mackeldey (Dropsie), *Roman law*[14], §§ 755–9.

was a perilous act owing to its many requisites,[354] the codicil was easily made and was without pitfalls. Codicils were originally enforced by Augustus as trusts to be discharged,[355] and subseqently became a very popular mode of testation. In the Early Imperial law, codicils were absolutely devoid of any formalities[356]; but in the Later Imperial and Justinianean law the presence of five witnesses was required, and they must sign the codicil if it was reduced to writing.[357]

But codicils were effectual only to carry a legacy or trust-bequest: no heir could be appointed or disinherited by codicil.[358] The essence of a codicil was an instruction to the heir or heirs to give away to others some article, or a part or the whole of an inheritance. Codicils made by a testator, who in his formal will (testamentum) had already confirmed them in advance, could carry legacies and trust-bequests.[359] Intestate decedents also could leave codicils: but these, although valid and binding upon the heirs ab intestato, were limited to trust-bequests.[360]

Differences between the Roman and the English codicil. § 715 The English term *codicil* is of Roman origin. Curiously enough a codicil in ancient English law was originally "an unsolemn last will" and one which would have been valid except for its failure to appoint an executor.[361] A codicil in Roman law was not a supplementary will; in English law it is. In Roman law a person dying intestate might make a codicil; in English law he cannot. English law requires the same form for a codicil as for a will; Roman law did not, — scarcely any formalities were necessary.

[354] See supra §§ 679, 685, 687, 689.

[355] *Inst.* 2, 25, pr.

[356] See *Inst.* 2, 25, 3.

[357] *Code*, 6, 36, 8, 3 (A.D. 424, — Theodosius II).

[358] *Inst.* 2, 25, 1–2; Gaius, 2, 273, 270a.

[359] Gaius, 2, 270a. See *Inst.* 2, 25, 1; *Dig.* 29, 7, frag. 2, 2; frag. 14. Codicils left by a decedent who died testate (i.e., had made a formal will or testamentum) were known as "codicilli confirmati."

[360] *Inst.* 2, 25, 1; Gaius, 2, 273, 270a; Paulus, *Sent.* 4, 1, 10. Codicils left by an intestate decedent were known as "codicilli non confirmati."

[361] See Williams, *Inst.* of Justinian[2], pp. 153–4.

CHAPTER II

MINOR EXAMPLES OF UNIVERSAL SUCCESSION

§ 716 **Bankruptcy: (1) involuntary bankruptcy (bonorum emptio, bonorum venditio).** The earliest Roman mode of enforcing a judgment debt was execution against the person of the debtor.[1] It was a product of the law for citizens (jus civile). This mode of execution existed in the law of the Republic and of the Early Empire.[2] But Constantine the Great abolished imprisonment for debt, except in cases of debtors able but obstinately refusing to pay.[3]

During the last century of the Republic a praetor named Publius Rutilius[4] introduced an alternative to personal arrest and imprisonment: namely a process of execution against the *entire* property of an insolvent debtor. This praetorian mode of enforcing a judgment debt was called *bonorum emptio* or *bonorum venditio*.[5] It was involuntary

[1] By the Law of the XII Tables (Table 3), if a debtor did not pay within 30 days after judgment was decreed, the creditor could seize him and bring him before the magistrate; if the debtor or his friends then failed to pay, the creditor could take the debtor away and keep him in chains for 60 days; if at the expiration of this time the *addictus* (debtor under arrest) still failed to pay although given three chances to do so before the praetor on successive market days, the creditor had the option either to sell him into slavery beyond the Tiber or to kill him and divide his body among all the creditors. The alternative of killing the debtor has been seriously questioned as incorrect. At any rate, it soon fell into disuse. See Aulus Gellius, 20, 1; Gaius, 3, 199; *Dig.* 4, 6, 23, pr.; Paulus, *Sent.* 5, 26, 2; *Dig.* 42, 1, 34; *Code*, 7, 71, 1.

[2] By a statute of the year 313 B.C. (the *lex Poetelia*) the creditor's right to sell or kill the debtor was abolished. But imprisonment for debt still remained for all judgment debtors (*judicati*): see Bethmann-Hollweg, *Röm. Civilprozess*, § 112.

[3] *Code*, 10, 19, 2 (A.D. 320).

[4] Probably the Rutilius who was consul 105 B.C.

[5] Gaius, 4, 35; Gaius, 3, 77; *Inst.* 3, 12, pr.

bankruptcy,[6] or the sale of all the property of a debtor (§ 716) against his will.

A debtor, against whom there was a judgment debt, was safe if he kept out of the creditor's way and thus avoided arrest and imprisonment. But in such a case the creditor or creditors could apply to the praetor for an order to take possession of the debtor's property[7]; and after the expiration of a certain period of time the creditors, acting through one of their number who had been chosen as manager (*magister*), sold the property of the debtor and applied the proceeds to their debts.[8]

Bonorum venditio was regarded as a mode of universal succession, the *bonorum emptor* or purchaser of the debtor's property acquiring all the debtor's assets and liabilities.[9] But in reality this was not a true case of universal succession[10]: for the bankrupt debtor did not suffer a change of status or lose his capacity to acquire property[11]; and he was not released from the liability of having his after-acquired property[12]

[6] On this subject see Gaius, 3, §§77–81; Gaius, 4, §§ 35 and 146; *Inst.* 3, 12, pr.; Theophilus, 3, 12, pr.; *Dig.* 13, 7, 26; *Dig.* 27, 10, 5 and 9; *Dig.* 42, titles 4 and 5; *Dig.* 50, 16, 56; *Bas.* 9, titles 6 and 7; Hunter, *Roman law*[4], p. 1036; Amos, *Roman law*, p. 190 et seq.; Mackeldey (Dropsie), *Roman law*[14], §§ 521–2; Poste, *Gaius*[4], p. 302; Smith, *Dict. of Greek and Rom. antiq.* "bonorum emptio"; Moyle, *Inst. of Justinian*, vol. i, 5th ed. pp. 282, 388, 656; Kniep, *Zum röm. Konkursverfahren* (Mélanges P. F. Girard, vol. i, p. 623, Paris, 1912).

[7] The so-called *missio in possessionem* or *missio in bona*. The first expression is derivable from *Dig.* 13, 7, 26, pr.: "in possessionem miserit." The benefit of this taking of possession was not limited to the creditors obtaining it: other creditors had the right to join those in possession, provided this was done within a certain time.

[8] For the details see Gaius, 3, 79; Theophilus, 3, 12, pr.

[9] Theophilus, *Inst.* 3, 12, pr. (near the end); Gaius, 2, § 98; Gaius, 3, §§ 77, 81; *Inst.* 3, 12, pr.; Hunter, *Roman law*[4], p. 1038; Mackeldey (Dropsie), *Roman law*[14], § 521. But the *bonorum emptor* acquired only bonitary or *praetorian* ownership (supra § 573) of the debtor's property: to get *dominium ex jure civile* he must hold it for the necessary period of prescription (Gaius, 3, 80; see Gaius, 4, 145.)

[10] This view of Buckland, *Elementary Roman law*, § 57, is sound.

[11] As to *capitis deminutio*, see supra § 432.

[12] Buckland, *Elementary Roman law*, § 164, holds that the creditor's right to after-acquired property was subject to the debtor's right to retain enough to support him (**beneficium competentiae**) within one year.

(§ 716) seized and sold, until the old debts of his creditors were fully satisfied.[13] The bankrupt debtor always suffered the not small disgrace and hardship of infamy.[14]

But by Early Imperial legislation it became possible for debtors of senatorial rank to avoid infamy by obtaining from the proper magistrate the appointment of a *curator bonorum*.[15] This official entered into possession of the property of the insolvent, and in due time sold it and paid the creditors pro rata out of the proceeds. But *no* universal succession took place. The Roman curator of a bankrupt estate is the prototype of the modern American trustee or assignee in bankruptcy or insolvency.[16]

After Diocletian, the new system of appointing curators was extended to every case of bankruptcy.[17] The result was, that

But this interpretation of *Code*, 7, 75, 6, is contrary to the accepted opinion which limits this favor to voluntary bankruptcy (*cessio bonorum* — see infra § 717). It should be noted tnat if a slave was made heir to an insolvent testator, the slave not only obtained his freedom but also was allowed to keep for himself all after-acquired property: Gaius, 2, 153–5; *Inst.* 2, 19, 1; Poste, *Gaius*[4], p. 309; supra § 665.

[13] Gaius, 2, 155. Buckland, *Id.*, § 57, remarks that the character of the purchaser (*bonorum emptor*) as a universal successor is somewhat doubtful because of our imperfect information to support the accepted opinion that he was liable to the creditors — in other words, that they could sue him. But that the property passed to the purchaser and that he could sue the debtors, there is no doubt whatever: Theophilus, 3, 12, pr.; Gaius, 3, 80.

[14] Gaius, 2, 154; Gaius, 4, 102; *Code*, 2, 12, 11; Cicero, *Pro Quint.* 15. See supra § 453.

[15] *Dig.* 27, 10, 5 (Gaius); *Dig.* 42, 7, 2, pr. The name and date of this senatusconsultum is unknown. This favor was sometimes obtainable as a privilege by creditors probably before the time of this statute: *Dig.* 27, 10, 9 (Neratius, — which jurist lived almost a century earlier than Gaius) It was possible to have more than one curator appointed: *Dig.* 42, 7, 2, 2. On the subject of the *curator bonorum* see also *Dig.* 42, 7, "De curatore bonis dando"; *Bas.* 38, 12, "De curatoribus bonis dandis"; *Code*, 7, 72, 10, 1; supra § 535; Mackeldey (Dropsie), *Roman law*[14], § 644.

[16] See infra references in last footnote of this § 716 and also in next to last footnote of § 717.

[17] The appointment of *magistri*, a special feature of the civil procedure of the Early Empire (known as the *formulary* or *ordinary procedure*), ceased after this procedure was supplanted by the procedure of the Later Empire (known as the *extraordinary procedure*): see *Inst.* 3, 12, pr.; Theophilus, 3, 12, pr.; *Code*, 3, 3, 2.

in the law of the Later Empire and of Justinian, involuntary bankruptcy ceased to be a mode of universal succession,[18] being superseded by seizure and sale of the debtor's property by order of court.[19] This sale was a sale of property a part at a time (*distractio bonorum*[20]), and it was essentially the the same as the regular Imperial mode — the latest and final Roman mode — of executing or enforcing a judgment debt in the case of non-insolvent debtors.[21]

Turning now to modern law, imprisonment for debt was universally allowed, particularly in the English Common Law.[22] But during the latter half of the 19th century imprisonment for debt was abolished.[23] And this is also true in the United States where imprisonment for debt ordinarily no longer exists,[24] although it formerly prevailed everywhere under the Anglo-American Common Law. Involuntary bankruptcy also is found in modern law, including that of England and the United States.[25]

§ 717 (2) **Voluntary bankruptcy (cessio bonorum).** For a long time during the Later Republic, creditors could collect their debts either by imprisonment or by compulsory bankruptcy of

[18] *Inst.* 3, 12, pr.; Theophilus, 3, 12, pr. and § 1 (at the end).

[19] As to the substitute for *bonorum venditio*, see *Dig.* 42, titles 4 and 5.

[20] This in no way could cause or suggest a universal succession, for it was a sale in detail or piecemeal, and not a sale *en bloc* like the old *venditio bonorum*.

[21] On the execution of judgments in the law of Justinian, see *Code*, 7, 53, 9; *Dig.* 42, 1, 31; *Dig.* 42, 1, 6, 2.

[22] Blackstone, *Commentaries*, vol. iii, p. 414; vol. ii, p. 473; Robinson, *Element. law*[2], § 347. The movement in England to abolish the imprisonment of debtors was in large measure due to Dickens' vivid description of this horrible system.

[23] For instance in France in 1867, in England in 1869, in Belgium in 1871, in Ireland in 1872, in Switzerland and Norway in 1874, in Italy in 1877, and in Scotland in 1880: 7 *Encycl. Britannica*[11], p. 906. It is, however, still allowed for a small period of time in England in a very few cases rarely happening: *Id.*

[24] For exceptional cases permitting arrest and imprisonment for debt, see *Id.*, and the statutes of the several states, especially Connecticut.

[25] Robinson, *Element. law*[2], § 103; Parsons, *Contracts*[8], p. 384; Black, *Law dictionary*[2], "bankruptcy"; 3 *Encycl. Britan.*[11], p. 327 (England), p. 332 (U. S., — Nat. Bankruptcy Act of 1898, amended 1903); *Code of civil procedure* of Spain, 1154.

(§ 717) the debtor.[26] If a creditor chose the older and barbarous procedure, the debtor could not save himself from arrest and imprisonment. But through the instrumentality of Julius or Augustus Caesar a new form of bankruptcy[27] was introduced in Roman law: namely the voluntary assignment by an insolvent, or voluntary bankruptcy (*cessio bonorum*).[28]

To encourage insolvent debtors to enter into voluntary bankruptcy the Imperial Roman law gave them the following benefits: exemption from imprisonment,[29] exemption from infamy,[30] and allowing a debtor to retain out of his after-acquired property enough for his subsistence.[31] After the insolvent had surrendered his property, the creditors proceeded to sell it in the same way as in bankruptcy against the will of the debtor.[32] And such was the law of Justinian. Voluntary

[26] Supra § 716.

[27] The *lex Julia de cessione bonorum:* Gaius, 3, 78; *Cod. Theod.* 4, 20; *Code*, 7, 71, 4. It is related by Julius Caesar that in 48 B.C. he as consul allowed debtors to discharge their debts by assigning their property to their creditors at a properly appraised value (*De bello civili*, 3, 1).

[28] As to *cessio bonorum* see Gaius, 3, §§ 77–8: *Cod. Theod.* 4, 20, "Qui bonis ex lege Julia cedere possunt"; *Inst.* 3, 25, 8; *Inst.* 4, 6, 40; *Dig.* 4, 8, 17, pr.; *Dig.* 42, 5, 24, § 2; *Dig.* 42, 3, "De cessione bonorum"; *Code*, 7, 71, "Qui bonis cedere possunt"; *Code*, 7, 72, 10; *Code*, 7, 73, 1; *Nov.* 135, "Ne qui cessione uti cognatur bonorum"; *Bas.* 9, 5, "De cessione bonorum"; Mackeldey (Dropsie), *Roman law*[14], §§ 523–6; Moyle, *Inst. of Just.* vol. i, 5th ed. pp. 390, 657; Hunter, *Roman law*[4], p. 1039; Amos. *Roman law*, p. 193; Sohm (Ledlie[3]), *Roman law*, p. 288; Poste, *Gaius*[4], p. 309; Kniep, *Zum röm. Konkursverfahren* (Mélanges P. F. Girard, vol. i, p. 623, Paris, 1912).

[29] "Ne judicati detrahantur in carcerem": *Code*, 7, 71, 1 (A.D. 223).

[30] "Debitores qui bonis cesserint . . . infames non fiunt": *Code*, 2, 11 (12), 11 (A.D. 223). See supra § 453.

[31] *Inst.* 4, 6, 40: *Dig.* 42, 3, frag. 4, 6, and 7; *Code*, 7, 72, 3. This privilege is known as **beneficium competentiae.** For other instance of it, see *Inst.* 4, 6, §§ 37–8; Poste, *Gaius*[4], p. 483. For the older rule that all after-acquired property was liable to be sold, see *Code*, 7, 71, 1 (A.D. 223). Sometimes a debtor could obtain on petition to the Emperor that the creditors should elect whether to accept a bankruptcy or to give the debtor a period of delay not exceeding 5 years (*quinquennales induciae*, or the so-called **beneficium quinquennalium**): see *Code*, 7, 71, 8; *Code*, 1, 19, 2–4; Hunter, *Roman law*[4], p. 1040; Amos, *Roman law*, p. 194.

[32] "Venditionis remedio": *Code*, 7, 71, 4; Poste, *Gaius*[4], 309; Moyle, *Inst. of Justinian*, vol. i, 5th ed., p. 391. See supra §§ 716, 535, as to *bonorum venditio* and *curator bonorum.*

bankruptcy (*cessio bonorum*) was not a mode of universal succession.

Turning now to modern law, voluntary bankruptcy is a well-known feature of modern jurisprudence.[33] The very term of the Roman law for voluntary bankruptcy — "cessio bonorum" — is preserved in the French "cession des biens" (voluntary bankruptcy) and in the Louisiana "cession of property" (voluntary bankruptcy). And in the English Common Law bankruptcy proceedings, the likeness between these and the Roman *cessio bonorum* is noted by Blackstone.[34]

Adrogation. The succession of an adoptive father to the property of the sui juris person adopted by adrogation has already been considered.[35] In the Roman law of Justinian this was a true case of universal succession.[36] § 718

Adjudication of a decedent's property to preserve gifts of freedom (addictio bonorum libertatis causa). This was a case of universal succession in the Justinian law whereby gifts of freedom[37] by a deceased person dying insolvent were supported, on application to the proper court, by judicial assignment of the property to a stranger who should carry out the testator's wishes.[38] § 719

Enslavement of women by the SC. Claudianum (successio ex senatusconsulto Claudiano.) This was a special feature of of the ante-Justinian Roman law of slavery. By the SC. Claudianum enacted during the reign of Claudius[39] a free woman, who after notice persisted in cohabiting with a slave, was deprived of her own freedom and also of her property; and both herself and her property passed to the owner of the § 720

[33] See for instance *Civil code* of France, 1265; Louisiana, 2170; Chile, 1614; 3 *Encycl. Britan.*[11] — which gives a synopsis of the bankruptcy law of various countries — p. 327 (England), pp. 331–2 (France, Germany, Italy, United States); *Code of civil procedure* of Spain, 1154.

[34] *Commentaries*, vol. ii, p. 473; Parsons, *Contracts*[8], vol. iii, p. 383.

[35] Supra § 502.

[36] See Gaius, iii, 82–4; iv, 38; *Inst.* 3, 10; Theophilus, 3, 10; *Dig.* 4, 5, 2, 3.

[37] See supra § 453.

[38] See *Inst.* 3, 11; Theophilus, 3, 11; *Dig.* 40, 5, frag. 1–4; *Code*, 7, 2, 15; *Bas.* 48, 4, 1–4; Hunter, *Roman law*[4], p. 742.

[39] In A.D. 52. See Tacitus, *Ann.* 12, 53.

slave.[40] This miserable mode of universal succession was abolished by Justinian.[41]

§ 721 **Marriage with marital power over the wife (co-emptio in manum).** This was a true case of universal succession in Republican and Early Imperial law. If a woman upon marriage became subject to the marital power of her husband, all her property and her liabilities passed to him.[42] This mode of universal succession was long obsolete in the time of Justinian.

§ 722 **Transfer of an inheritance (cessio in jure hereditatis).** In Republican and Early Imperial law an heir, upon whom an inheritance had involved, could, *prior* to the time when by formal acceptance the legal title to the inheritance became fully vested in him,[43] sell or cede his inheritance to another person, who by this cession then became heir.[44] This was not a true case of succession, for it was merely the transfer of a universitas to which the natural heir had a legal title only just commencing and not yet complete. It was long obsolete in the law of Justinian.

§ 723 **Transfer of a prospective inheritance from a freedman by his ex-master or patronus to a child of the ex-master (adsignatio liberti).** This was a transfer, generally by will, of a prospective inheritance from a freedman.[45] Although this existed in the law of Justinian, it was not a true case of universal succession: for the inheritance transferred was only prospective — the inheritance had not devolved upon the ex-master when he assigned whatever future right he might have to it.

[40] Gaius, 2, 91 and 160; *Inst.* 3, 12, 1; Theophilus, 3, 12, 1. See Paulus, *Sent.* 2, 21a, 17.

[41] *Code*, 7, 24, 1.

[42] Gaius, iii, 82–4; iv, 38; supra § 472.

[43] That is, before *aditio hereditatis* was made: see supra § 665.

[44] See Gaius, ii, 34–7; iii, 86–7; *Dig.* 2, 14, 16, pr.; *Dig.* 18, 4, 14, 1; *Code*, 4, 39, 6; Buckland, *El. Roman law*, § 57; Hunter, *Roman law*[4], p. 881.

[45] See *Inst.* 3, 8; Theophilus, 3, 8; *Dig.* 38, 4, 1, pr.; *Dig.* 38, 3, 1; Buckland, *El. Rom. law*, § 57; Hunter, *Roman law*[4], p. 870.

BOOK IV

OBLIGATIONS

BOOK IV

OBLIGATIONS[1]

TITLE I

GENERAL PRINCIPLES OF OBLIGATIONS

Obligation defined. Quite modern is the Roman conception of an obligation as the legal necessity[2] imposed on a person of doing or abstaining from a determinate act.[3] Bracton, the father of the English Common Law, uses the word obligation as a bond or chain,[4] which was its meaning in Roman law. But obligation is used in a wider sense in Roman than in English law: in the former "it signifies rights as well as duties, the right, for example, to have a debt paid as well as the duty of paying it."[5] § 724

The nature of an obligatory right is always *in personam* — that is, available against a specific person; its essence is different from that of a real right which is always in rem — that is, available against the whole world.[6] Another characteristic of an obligation is that it is enforceable by an action at law,

[1] The subject of obligations is treated by itself in a separate book in the Spanish, German, Japanese, Chilean, and Mexican civil codes. In Swiss law, obligations form a separate code. But in the French, Louisiana, Italian, and Quebec civil codes the subject of obligations is treated as one of the different modes of acquiring ownership, and is placed in the book containing these modes.

[2] "Juris vinculum": *Inst.* 3, 13, pr.

[3] This definition is summarized from the definitions of Paulus, Ulpian, and the Institutes of Justinian: see *Dig.* 44, 7, 3, pr. (Paulus); *Dig.* 40, 7, 9, 2 (Ulpian); *Inst.* 3, 13, pr.

[4] Bracton, f. 78 b; Scrutton, *Roman law and the law of England*, p. 102. Bracton uses the identical words "juris vinculum" of *Inst.* 3, 13, pr. See supra vol. i, § 374.

[5] Maine, *Ancient law*, 3d. Am. ed., ch. ix, p. 314. Such phrases as "obligatio acquiritur" (*Inst.* 3, title 28; *Dig.* 23, 3, 46, pr.) and "nomine obligationis" (*Dig.* 45, 1, 128) would seem strange in English and American law.

[6] See supra §§ 569, 572, 582.

which feature distinguishes it from a moral duty. There is no legal "bond" in the case of a moral duty. It was Bracton who introduced into English law the celebrated phrase that an obligation is the mother of an action, which comparison he took from Azo, a famous Italian Glossator.[7]

The subject of an obligation is generally, though not always, reducible to a money value.[8] The object of an obligation may be a transfer of ownership, or a performance, or an abstention from doing something.[9]

§ 725 **Formation and classification of obligations.** Roman law classified obligations in several ways. One classification was into *civil* and *praetorian:* this was based on their origin, — namely whether derived from the law for citizens (jus civile) or from the praetorian law.[10] But this classification is not pertinent in modern law. Somewhat analogous to the Roman praetorian obligations is the equitable relation arising in English law between the beneficiary of a trust and the trustee.[11]

Another Roman classification divided the sources of obligations into contracts and delicts (torts),[12] and arranged obligations into four classes: *contracts*, *quasi contracts*, *delicts*, and *quasi delicts*.[13] This classification is based on the nature of

[7] "Obligatio mater actionis": Bracton, 99. See Azo, 1103; Scrutton, *Roman law*, p. 101; Williams, *Inst. of Justinian*[2], p. 165; supra vol. i, §213.

[8] This is true in modern law: for instance the *Civil code* of Japan, 399 (Lönholm), states that "the subject of an obligation may be something not capable of being estimated in money."

[9] Savigny, *Das Obligationenrecht*, §2, says: "The idea of obligation consists in the control over another person; not however a complete control (for this would result in the absorption of personality itself), but a control over isolated acts which must be considered as a restriction on his liberty and a subjection to our will . . . One person has his personal liberty extended beyond its natural limits, — he controls the acts of another; the other party has his natural liberty restricted, — put into subjection. These opposite conditions of the parties to an obligation may be considered as two distinct activities: one, performance or rendition by the debtor, and the other, the coercion or right of action which can be employed by the creditor."

[10] *Inst.* 3, 13, 1. See supra vol. i, §§ 40, 41, 44.

[11] Williams, *Inst. of Justinian*[2], p. 166.

[12] Gaius, 3, 82.

[13] *Inst.* 3, 13, 2.

the transactions which give rise to obligations; and it has descended into all modern jurisprudence including the Anglo-American.[14] In its final development the Roman law of obligations — particularly contracts and quasi contracts — has very extensively survived in modern law, which thus has become a great debtor to Roman jurisprudence.[15]

Roman and modern conceptions of "creditor" and "debtor". § 726 The widest, general meaning of the terms "creditor" and "debtor" was as follows: an obligation created a personal relation, which involved both a right and a duty; the person who has the right to exact something was known as the *creditor*,[16] while the person upon whom falls the duty of performing or transferring something was known as the *debtor*.[17] But the wide use in Roman law of the terms "creditor" and "debtor" to refer to the parties to any obligation is narrowed in English law solely "to the parties of an obligation for the payment of money."[18]

Correal obligations. In both Roman and modern law § 727 there may be more than one creditor or debtor in the same transaction.[19] The obligation of co-creditors or co-debtors is known as a correality.[20] Joint or correal obligations are found in many modern systems of law, such as the Anglo-American, French, Spanish, German, and Japanese.[21]

Transmissibility of obligations. Although in Roman law § 728 obligations generally descended to one's heirs,[22] yet there

[14] Williams, *Inst. of Justinian*[2], p. 166.

[15] See infra vol. iii, § 1002.

[16] *Dig.* 50, 16, 11. The Latin word is "creditor".

[17] *Dig.* 50, 16, 108. The Latin word is "debitor".

[18] Williams, *Inst. of Justinian*[2], p. 165.

[19] See for instance, *Inst.* 3, 16. Joint creditors or debtors were called "conrei" (correi): *Dig.* 34, 3, 3, 3.

[20] On correal obligations see Mackeldey (Dropsie), *Roman law*[14], § 361; Hunter, *Roman law*[4], pp. 551–62; Moyle, *Inst. of Justinian*, vol. i; 5th ed., pp. 487–93; Poste, *Gaius*[4], pp. 353–5.

[21] *Bartlett* v. *Robbins*, 5 Metc. (Mass.), 186; *Civil code* of France, 1200–1216, 1199; Spain, 1137–48; Germany, 420–32; Japan, 427, 432–44; Louisiana, 2077, 2080–81.

[22] *Inst.* 3, 24, 6; Howe, *Civil law*[2], pp. 262–3. See supra § 663 and also second footnote of § 664.

were important exceptions to this rule.[23] For instance a tort action arising ex delicto was not available against the heir of the person committing the wrong.[24] And the English Common Law is the same.[25] Moreover, in Roman law the contractual obligations of a personal character, such as the contract of letting and hiring and the contract of partnership, did not descend to heirs; the death of the workman hired, or of a partner, extinguished these contracts.[26] And the English Common Law is the same as the Roman.[27]

§ 729 **Extinction of obligations: (1) performance (solutio). A. Payment.** The Roman modes of dissolving obligations varied with the period of Roman law considered. In the time of Justinian there were numerous ways of extinguishing obligations. Many of these modes of extinction[28] really constituted separate contracts, which have survived in modern law.

The Roman law defined performance as the accomplishment of an obligation.[29] Performance was a term of very wide meaning: it signified every satisfaction whatsoever[30] by giving, doing, permitting, or not doing in accordance with the promise made.[31] Actual performance or fulfillment as a mode of extinguishing an obligation has its English law counterpart.[32]

[23] See *Inst.* 4, 12, 1: Gaius 4, 112–13, Williams, *Inst. of Justinian*[2], p. 303. But to prove a fact, more than one witness must be furnished: *Code*, 4, 20, 9.

[24] *Inst.* 4, 12, 1: Gaius, 4, 112–13. But the heir of the person wronged could obtain compensation from the offender, provided the person injured or wronged had — prior to his death — commenced a suit at law: *Dig.* 47, 10, 13, pr. Torts or delicts are treated infra §§ 813 et seq.

[25] The action dies with the person of the tortfeasor, — "actio personalis moritur cum persona": *Phillips* v. *Homfray*, 24 Chan. Div. 439; Williams, *Inst. of Justinian*[2], pp. 302–3.

[26] *Inst.* 3, 24, 6; Hunter, *Roman law*[4], p. 650.

[27] "Actio personalis moritur cum persona": see Williams, *Id.*; *Finlay* v. *Chirney*, 20 Q. B. 494; *Phillips* v. *Homfray*, 24 Chan. Div. 439.

[28] Such as novation (infra § 739).

[29] On the subject of *solutio*, see Inst. 3, 29, pr.; Hunter, *Roman law*[4], pp. 633–6; Amos, *Roman law*, pp. 184–5; Howe, *Civil law*[2], pp. 251–6.

[30] "Solutionis verbum pertinet ad omnem liberationem, quoque modo factam": *Dig.* 46, 3, 54.

[31] "Solvere dicimus eum qui fecit facere quod facere promisit": *Dig.* 50, 16, 176.

[32] Williams, *Inst. of Justinian*[2], pp. 237–9.

And it is also recognized in other legal systems, for instance (§729) the French, German, Spanish, Italian, Japanese, Louisiana, and California law.[33]

Very frequently in Roman law, performance meant simply the discharge of a debt by **payment** of the money owed.[34] And the same is also true in modern law.[35] A proper payment is one made to the creditor himself or to his authorized agent[36] at the time and place agreed upon.[37] The *time* of payment is also of material importance in American law. In the case of *Ellis* v. *Craig*, decided in 1823,[38] Chancellor Kent held that a loan of money to be paid *at or on a certain day* specified, and bearing interest, cannot be paid by the debtor against the creditor's consent before the day fixed for payment.

In Roman law the **receipt** (*apocha*), or acknowledgment in writing of the payment of the debt, was but an admission of the sum actually received: it was not conclusive as to payment.[39] And the same is true of a receipt in American law.[40]

It was finally held in Roman law that a creditor must receive a **payment of part of a debt** as a discharge pro parte.[41] And this is also a rule of modern jurisprudence, including American

[33] *Civil code* of France, 1235 et seq; Germany, 241 et seq.; Spain, 1145, 1156–81; Italy, 1237 et seq.; Japan, 474 et seq.; Louisiana, 2130–58; California, 1473–9.

[34] See *Inst.* 3, 29, pr. As to proof of satisfaction by payment, see *Code*, 4, 30, 14, § 2; *Code*, 4, 20, 18; Amos, *Roman law*, p. 185.

[35] *Civil code* of Japan, 474 et seq.; Germany, 241 et seq.; Italy, 1237 et seq.; France, 1235 et seq. ("paiement"); Spain, 1145, 1156–81; Louisiana, 2130–58; California, 1473–9; *Moulton* v. *Robinson*, 27 N. H. 554 (Eng. & U. S.); Black, *Law dictionary*[2], "payment," p. 883; Williams, *Inst. of Justinian*[2], pp. 237–9.

[36] See *Dig.* 46, 3, 12, 2 and 4, *Dig.* 46, 3, 34, 3, *Dig.* 46, 3, 38, 1, for cases of valid payment to agents whose authority, unknown to the debtor, had been revoked by the creditor. See *Dig.* 46, 3, 58, pr., for a case of valid payment to an unauthorized agent (*negotiorum gestor*, — treated infra § 810).

[37] *Dig.* 22, 1, 41, 1.

[38] 7 Johnson's Chan. (N. Y.), 7.

[39] *Code*, 8, 42 (43), 6. But it was regarded as better evidence of payment than the return of the written obligation itself to the debtor: *Code*, 8, 42 (43), 14.

[40] *Krutz* v. *Craig*, 53 Ind. 574; *Kegg* v. *State*, 10 Ohio, 75.

[41] *Dig.* 12, 1, 21.

(§ 729) law.[42] But where there are several debts all owed by the same debtor to the same creditor, and the debtor makes a payment which is less than the aggregate amount owed, the payment is not apportioned equally to all the debts, but certain debts are extinguished before the rest.

The rules as to the application of payment to a particular debt, when there are several debts due, constitute the Roman doctrine of the **imputation or appropriation of payments**[43] which has widely survived in modern jurisprudence, for instance in French, German, Italian, Spanish, Japanese, Louisiana and the English Common Law.[44] In particular, the law of England and America sometimes uses the very language of the Roman law.[45]

If the debtor himself fails to exercise his right of designating the debt to which the payment is to be applied, the creditor can, in Anglo-American law, apply the payment to a debt barred by the statute of limitations[46]: but in Roman law the creditor must apply it to the debt most burdensome to the debtor,[47] — a rule far more favorable and merciful to the debtor's welfare than the English rule. The Louisiana code also follows the Roman rule in this case.[48]

But if neither the debtor nor the creditor designates any application of the payment, the Roman law again appropriated the payment to the debt most burdensome to the debtor[49]:

[42] *Young* v. *Perkins*, 29 Minn. 173, 12, N. W. Rep. 515; *Moffitt* v. *Carr*, 48 Neb. 403, 67 N. W. 150, 58 Am. St. Rep. 696.

[43] "Imputation des paiements": *Civil code* of France, 1253–6. "Imputation of payments": *Civil code* of Louisiana, 2163–6. "Appropriation of payments": 1 Story, *Eq. jurisprudence*[13], §§ 459 et seq. On this subject see Hunter, *Roman law*[4], p. 635.

[44] *Civil code* of France, 1253–5; Germany, 366; Italy, 1255–8; Spain, 1172–4; Japan, 488; Louisiana, 2163–6; 1 Story *Eq. jurisprudence*[13], § 459 et seq. (Eng. & U. S.); Williams, *Inst. of Justinian*[2], p. 244; *Gwin* v. *McLean*, 62 Miss. 121; *Martin* v. *Draher*, 5 Watts (Pa.), 544.

[45] Story, *Eq. jurisprudence*[13], vol. i, §§ 459 et seq.

[46] Williams, *Inst. of Justinian*[2], p. 244; Snell, *Equity*, pt. iii, ch. iii.

[47] *Dig.* 46, 3, 1, — a debt carrying interest was regarded as more burdensome than one carrying no interest.

[48] *Civil code* of Louisiana, 2166.

[49] *Code*, 8, 42 (43), 1. And see *Dig.* 46, 3, 1, where money paid, if not designated, was applied in the discretion of the creditor.

while our law again applies it to the earliest debt.[50] Although in Roman law there were no rules as to the appropriation of securities,[51] yet it would seem that the Roman law was by implication in accord with the rule of English law that if a trustee mixed money belonging to the trust with his own money and drew cheques on the aggregate fund deposited in a bank, the trustee is regarded to have withdrawn his own money in preference to the trust-money.[52]

B. Specific performance; and performance by a stranger. § 730 The modern doctrine of specific performance[53] of contracts has been evolved from the elmentary principles of the same doctrine as found in Roman law.[54] Performance by a stranger to the contract extinguishes the obligation in both Roman and modern law provided the creditor does not object.[55]

C. Performance as affected by default or delay (mora). § 731 In Roman law, performance might be interfered with by one of the parties becoming in default (mora).[56] By default — also

[50] Williams, *Inst. of Justinian*[2], p. 244.

[51] As to negotiable instruments in Roman law, see infra § 805. The English law rules as to the appropriation of securities began with *Ex parte Waring*, 19 Vesey, 345.

[52] "Nihil eum praestare, cum culpa careat": *Dig.* 36, 1, 23 (22), 3; this seems to imply that the *heres fiduciarius* would have been liable to the *fideicommissarius*. For the English rule, see *Re Hallett's Estate*, 13 Ch. Div. 696; Williams, *Inst. of Justinian*[2], p. 245.

[53] See for instance *Civil code* of France, 1142; Louisiana, 1926; Japan, 399; Williams, *Inst. of Justinian*[2], p. 172. "The subject of an obligation may be something not capable of being estimated in money": Japan, 399 (Lönholm).

[54] The *formula arbitraria* with the clause "nisi restituat" in the condemnatio (Gaius 4, 47; see infra § 848) approaches the enforcement of specific performance. Moreover there is an elementary specific performance noticed in *Dig.* 46, 3, 31; *Dig.* 46, 3, 99; Hunter, *Roman law*[4], p. 633. CONTRA: 1 Spence, *Equity*, p. 665, and Fry, *Specific performance*, ch. i, who hold that specific performance was not derived from the Roman law. Fry gives its origin as from the Canon Law (supra vol. i, §§ 225 et seq).

[55] ROMAN LAW: Inst. 3, 29, pr.; Gaius 3, 168 ("consentiente creditore"). MODERN LAW: *Civil code* of Germany, 267; Schuster, *German law*, § 157(f); Williams, *Inst. of Justinian*[2], p. 238.

[56] On this subject see Hunter, *Roman law*[4], pp. 653–4; Williams, *Inst. of Justinian*[2], pp. 212, 232. "Default" is the term used in the *Civil code* of Louisiana, 1910–12.

(§ 731) termed laches [57] — was meant delay in performing or receiving performance. It was a question of fact rather than of law.[58] The Roman law expression of being "in mora" has survived in the Spanish expression "en mora" and the French "en demeure"[59], both of which mean the same as the Roman. And the English expression "in default"[60] is also equivalent. The Roman doctrine of mora has descended widely into modern jurisprudence, for instance the French, German, Italian, Spanish, Louisiana, Japanese, and English law.[61]

(1) *Debtor's delay (mora solvendi).* In both Roman and modern law if a person does not perform his promise when he agrees to do so, but subsequently performs, he is in default because of his delay.[62] Default occurs after a demand for performance has been refused.[63] The effect of default may render a debtor liable to pay interest.[64] Furthermore the debtor must suffer all the resulting loss, if the thing promised is destroyed without negligence of either party to the contract.[65]

[57] Hunter, *Roman law*[4], pp. 653–4.

[58] *Dig.* 22, 1, 32, pr., where a rescript of Antoninus Pius to this effect is cited by the Roman jurist Marcian. See also *Dig.* 22, 1, 24, pr.; *Dig.* 22, 1, 47; *Dig.* 18, 6, 18 (17).

[59] *Civil code* of France, 1138; Spain, 1100.

[60] See Black, *Law dictionary*[2], "default"; *Civil code* of Louisiana, 1910.

[61] *Civil code* of France, 1138–9; Italy, 1223; Spain, 1100, 1101, 1108; Louisiana, 1910–12; Japan, 412; Germany, 284–90, 293–303; Schuster, *German law*, §§ 160–61; Williams, *Inst. of Justinian*[2], pp. 212, 213, 232. And *Mitchell* v. *Lancashire Ry. Co.*, L. R. 10 Q. B. 256, thoroughly agrees with *Dig.* 18, 16, 18 (17). See also *State* v. *Moore*, 52 Neb. 770, 73 N. W. 299; *Mason* v. *Aldrich*, 36 Minn. 283, 30 N. W. 884; Black, *Law dictionary*[2], "default" and "laches".

[62] ROMAN LAW: Sohm (Ledlie[3]), *Roman law*, p. 370. MODERN LAW: Williams, *Inst. of Justinian*[2], pp. 212, 231, 232; *Civil code* of Germany, 284, 290, 326, 361; Schuster, *German law*, § 160.

[63] "Mora fieri intelligitur non ex re sed ex persona, id est, si interpellatus opportuno loco non solverit": *Dig.* 22, 1, 32, pr. Hence the Roman demand is known as *interpellatio.*

[64] ROMAN LAW: *Dig.* 22, 1, 32, 2; *Dig.* 19, 1, 49, 1; *Dig.* 22, 1, 1, pr.; *Code*, 4, 32, 26, 1. MODERN LAW: Williams, *Inst. of Justinian*[2], pp. 212, 231.

[65] *Periculum rei* belongs to the debtor in mora: *Dig.* 44, 7, 45; *Dig.* 45, 1, 91, pr; *Dig.* 7, 1, 37; *Dig.* 45, 1, 91, 3; Hunter, *Roman law*[4], p. 654.

(2) *Creditor's delay* (*mora accipiendi*). But if the creditor is guilty of delay in receiving the thing due or the performance, he must bear whatever loss is occasioned by his laches.[66]

D. Performance as affected by negligence (culpa). In § 732 both Roman and modern law the performance of a contractual obligation is also greatly affected by responsibility for damage due to negligence (culpa) or the failure to exercise care (diligentia).[67] The English negligence is the same as the Roman culpa.[68] In Roman law there were two degrees of failure to exercise care: gross negligence (culpa lata) and ordinary negligence (culpa levis).[69] Both degrees of negligence are recognized in English law.[70]

[66] ROMAN LAW: *Dig.* 45, 1, 105; *Dig.* 46, 3, 72, pr. MODERN LAW: Schuster, *German law*, p. 161; *Civil code* of Germany, 293–303.

[67] On the subject of negligence, see Moyle, *Inst. of Justinian*, vol. i, 5th ed. p. 485; Mackenzie, *Roman law*[7], pp. 208–10; Mackeldey (Dropsie), *Roman law*[14], §§ 373–6; Amos, *Roman law*, pp. 137–8; Howe, *Civil law*[2], pp. 294–5. Negligence which causes a liability ex contractu consists in some omission to act (in *non* faciendo); negligence which causes a liability ex delicto consists in some positive act done (in faciendo). Negligence as a *tort* or delict is treated infra § 832.

[68] Williams, *Inst. of Justinian*[2], p. 226.

[69] This true Roman doctrine was established by Hasse in his *Die Culpa des röm. Rechts*, Kiel, 1815. It had been first advanced in the 16th century by Doneau (see supra vol. i, § 246) in his *Comm. juris civilis*, 16, ch. 6, 7; but Doneau's view did not prevail. Hasse in his treatise completely extinguished the centuries-old theory originated by medieval civilians that there were three degrees of negligence in Roman law, *culpa lata*, *levis*, *levissima*. Although the term "culpa levissima" is mentioned once in the Corpus Juris ("in lege Aquilia et levissima culpa venit", *Dig.* 9, 2, 44, pr.), under the lex Aquilia — see infra § 828 — *any* kind of *culpa as a tort* would always give rise to an action at law; moreover "culpa levissima" is included in "culpa levis". But the older theory of three degrees of negligence, which was not upset until during the 19th century, has descended into modern law. It exists in Anglo-American law: Williams, *Inst. of Justinian*[2], p. 226, note 1; Black, *Law dict.*[2] p. 811; Jones, *Bailments* (Sir William Jones follows the older theory). It exists in Louisiana law; *Civil code*, 3556, no. 13, "there are in law three degrees of faults: the gross, the slight, and the very slight."

[70] Williams, *Inst. of Justinian*[2], p. 226; *Godefroy* v. *Dalton*, 6 Bing. 467; *Giblin* v. *Mullen*, L. R., 2 P. C. 336; *Ouderkirk* v. *Bank*, 119 N. Y. 263, 23 N. E. Rep. 875; *Briggs* v. *Spaulding*, 141 U. S. 132. But the law of England and America recognizes also a third degree of negligence: see the preceding footnote.

(§ 732) 1. *Gross negligence (culpa lata or magna) — that is, negligence due to the absence of slight care.* In both Roman and English law, gross negligence is a failure to observe slight diligence; it is excessive carelessness or the absence of that care which even any inattentive or thoughtless man would exercise.[71] Gross negligence is frequently considered as practically equivalent to fraud.[72]

2. *Ordinary negligence (culpa levis)*: (1) *negligence due to the absence of ordinary care.* In Roman law there were really two varieties of ordinary negligence (culpa levis[73]), each determined by a different standard of carefulness: namely negligence due to the absence of ordinary care, and negligence due to the absence of the greatest care. Both of these varieties of negligence are recognized also in English law. Negligence due to the absence of ordinary care is a failure to observe such diligence as a man of ordinary prudence would exercise for himself.[74]

[71] ROMAN LAW: *Dig.* 50, 16, 213, § 2 ("lata culpa est nimia negligentia, id est non intellegere quod omnes intellegunt"). MODERN LAW: *Godefroy* v. *Dalton*, 6 Bing. 467; *Lichfield* v. *White*, 7 N. Y. 442; *Briggs* v. *Spaulding*, 141 U. S. 132; Williams, *Inst. of Jusiinian*[2], p. 226; Black, *Law dict.*[2], p. 811; *Civil code* of Louisiana, 3556, no. 13 ("gross fault is that which proceeds from inexcusable negligence or ignorance").

[72] ROMAN LAW: *Dig.* 11, 6, 1, 1 ("lata culpa plane dolo comparabitur"): *Dig.* 50, 16, 226 ("magna culpa dolus est"); *Dig.* 17, 1, 29, pr. ("prope dolum"); *Dig.* 47, 4, 1, § 2 ("dolum repraesentat"). MODERN LAW: Williams, *Inst. of Justinian*[2], p. 227; *Ratcliffe* v. *Barnard*, 1 L. R., 6 Ch. 654; *Civil code* of Louisiana, 3556, no. 13 ("gross fault . . . is considered as nearly equal to fraud").

[73] In Roman law, "culpa levis' is usually referred to as "culpa" simply. The care necessary to avoid culpa levis is called "diligentia", "exacta" or "exactissima diligentia": see for instance *Inst.* 3, 14, 2; *Inst.* 3, 27, 1.

[74] ROMAN LAW: *Dig.* 10, 2, 25, § 16 ("talem igitur diligentiam praestare debet, qualem in suis rebus adhibere solet"). This is what the Civilians or Romanists call *culpa levis in concreto.* This standard of carefulness — that a man should be as careful as he would be in his own affairs — was applied to the depositee (*Dig.* 16, 3, 32, — see infra § 758); to a guardian, whether tutor or curator (*Dig.* 27, 3, 1, pr., — see supra § 520); to partners as between themselves (*Dig.* 17, 2, 72 and *Inst.* 3, 25, 9, — see infra § 797); and to heirs and legatees as between themselves (*Dig.* 10, 2, 25, § 16, — see supra §§ 665, 706). MODERN LAW: *Ouderkirk* v. *Bank*, 119 N. Y. 263; Black, *Law dict.*[2], p. 811, "ordinary negligence."

2. *Ordinary negligence* (*culpa levis*): (2) *negligence due to the absence of the greatest care.* In both Roman and modern law, negligence due to the absence of the greatest care is a failure to observe such diligence as a good man of business or a very prudent man would exercise.[75]

E. Measure of damages for breach of contract in case of non-performance. Finally, when there is a non-performance of a contract, the measure of damages for breach of contract becomes an important matter. In Roman law, damages were of three sorts: ordinary, limited, and conventional. § 733

(1) *Ordinary damages.* The actual loss suffered by a contracting party owing to a breach of the contract constituted ordinary damages. The market value was the usual criterion.[76] And in some cases the measure of damages included consequential damages.[77]

(2) *Limited damages.* These were simply the amount the defendant was able to pay.[78] The action on partnership was an illustration of this lower measure of damages.

(3) *Conventional damages.* The parties to a contract might have previously agreed upon the amount to be regarded as equivalent to the loss sustained by a breach of the contract: these damages were called conventional or penal.[79]

[75] ROMAN LAW: *Dig.* 19, 2, 25, § 7 ("culpa autem abest, si omnia facta sunt, quae diligentissimus quisque observaturus fuisset"). This is what the Civilians call *culpa levis in abstracto.* This standard of carefulness — that a man should be answerable for all carelessness avoidable by a prudent man of business — was applied to the seller (*Dig.* 18, 6, 13, — see infra § 787); to the hirer (*Dig.* 19, 2, 31, — see infra § 792), to the pledgee (*Inst.* 3, 14, 4, — see infra § 759); to the borrower in commodatum (*Inst.* 3, 14, 2, — see infra § 757); the depositor (*Dig.* 47, 2, 62, § 5); and to agents whether authorized or unauthorized (*Code*, 4, 35, 13, and *Inst.* 3, 27, 1, — see infra §§ 802, 810). MODERN LAW: *Briggs* v. *Spaulding*, 141 U. S. 132; Black, *Law dict.*[2], p. 811 "slight negligence"; *Civil code* of Louisiana, 3556, no. 13 ("slight negligence is that want of care which a prudent man usually takes of his business").

[76] "Verum rei pretium", but it might be "quanti ea res est" (that is, how much the plaintiff has lost); *Dig.* 50, 16, 193; *Dig.* 39, 2, 4, 7; Hunter, *Roman law*[4], p. 651.

[77] When the breach of contract was willful: Hunter, *Id.*

[78] "In quantum facere potest": *Dig.* 42, 1, 19, 1; Hunter, *Id.*

[79] *Inst.* 3, 15, 7; Hunter, *Roman law*[4], pp. 651–2.

§734 **Extinction of obligations: (2) tender (consignatio).** In Roman law, tender of payment discharged the debt and extinguished the obligation.[80] To make a formal tender, the money due must be deposited in some public place of safety, such as a temple.[81] In some modern legal systems the tender may be deposited in a public place of safety, such as a bank or the office of certain public officials.[82]

The Roman tender of payment ("consignatio") has survived with its names and principles in the "consignation" of French law, in the "consignment" or tender of Louisiana law, and in the "consignación" of Spanish law.[83] The Roman tender has also descended into other modern legal systems, for instance the Italian, German, Japanese, and Anglo-American.[84]

§735 **Extinction of obligations: (3) release.** In Roman law there existed both formal and non-formal releases of obligations. Actual performance,[85] especially in the Republican and the Early Imperial law, did not always suffice to dissolve an obligation ex contractu, although it was the natural mode of extinction: if the contract was of a formal nature, the release also must be formal.[86] In other words the divestitive facts of an obligation must be of a nature similar to the investitive.[87]

1. *Formal releases:* (1) *nexi liberatio or release per aes et libram.* The ancient Roman contract of *nexum*, or loan made

[80] *Code*, 4, 32, 19; Hunter, *Id.* p. 637. Tender was also a mode of performance (*solutio*, — see supra § 729).

[81] *Dig.* 26, 7, 28, § 1; *Code*, 4, 32, 19, 1; *Code*, 8, 42 (43), 9; The court might specify the place of deposit: *Code*, 4, 32, 19, 1. The money tendered was deposited in a sealed bag (*depositio et obsignatio*). A mere offer to pay (*oblatio*) was not a formal tender.

[82] *Civil code* of California, 1500; France, 1258.

[83] *Civil code* of France, 1257–64; Louisiana, 2167–9; Spain, 1176 et seq.

[84] *Civil code* of Italy, 1259–66; Germany, 372 et seq; Japan, 494–5; California, 1500; Williams, *Inst. of Justinian*[2], p. 243; *Salinas* v. *Ellis*, 26 S. C. 337, 2 S. E. Rep. 121; *Smith* v. *Lewis*, 26 Conn., 119; *Noyes* v. *Wyckoff*, 114 N. Y., 204, 21 N. E. Rep. 158.

[85] See supra § 729 as to *solutio*.

[86] In other words, the then Roman law drew a distinction between *naturalis* and *civilis* extinction (*solutio*).

[87] "Prout quidque contractum est, ita et solvi debet": *Dig.* 46, 3, 80. See *Dig.* 50, 17, 35.

by *mancipatio* — the formal conveyance by money and the balance,[88] could be dissolved only by a reconveyance made in the same manner.[89] (2) *Acceptilatio verbis*. To dissolve the Roman formal verbal contract of *stipulatio*, a release by stipulation, known as acceptilation, was necessary.[90] But any claim might be transformed by novation [91] into a verbal obligation annullable by acceptilation.[92] For the purpose of extinguishing a number of debts at one and the same time the jurist Gallus Aquilius [93] invented a stipulation, subsequently called the *Aquilian stipulation*, which first converted the debts jointly into a verbal obligation and then proceeded to dissolve them by acceptilation.[94] (3) *Acceptilatio liveris*. The ancient Roman literal contract of *expensilatio*, which was based on an entry in a book of account, could be dissolved only by another bookkeeping entry.[95] (§ 735)

2. *Non-formal release* (*contrarius consensus*, *pactum non petendo*). All the Roman formal releases, except annulment by stipulation (acceptilatio verbis [96]), were obsolete in the Justinian law. Their place had been taken by releases devoid of formality, which might be express or even tacit.[97] Release as a mode of extinguishing obligations has descended into modern law, for instance that of France, Germany, Spain, Italy, Japan, California, Louisiana, and our English Common

[88] Gaius, 2, 59. As to mancipatio, see supra §§ 570, 573. The contract of nexum, which was entirely obsolete after 313 B. C., is treated infra § 754.

[89] Gaius, 3, 173–4; Hunter, *Roman law*[4], p. 641.

[90] Gaius, 3, 169; *Inst.* 3, 29, 1, *Dig.* 46, 4, 16, 1; Hunter, *Roman law*[4], pp. 639–41. See also *Dig.* 39, 5, 17: *Code*, 8, 43 (44), 2. Stipulatio is treated infra § 767.

[91] Defined infra § 739.

[92] *Inst.* 3, 29, 1.

[93] A contemporary of Cicero: supra vol. i, § 53.

[94] *Inst.* 3, 29, 2.

[95] Gaius, 3, 128–33; Poste, Gaius[4], pp. 361–5; Hunter, *Roman law*[4], p. 641; Bernard (Sherman), *Roman law*, §§ 456, 457. Expensilatio, which is not found in the law of Justinian, is treated infra § 776.

[96] See *Inst.* 3, 29, 1–2.

[97] See *Dig.* 2, 14, 2, 1; Howe, *Civil law*[2], p. 259; Hunter, *Roman law*[4], pp. 642–3; Mackeldey (Dropsie), *Roman law*[14], §§ 541–2; Girard, *Droit romain*[5], pp. 715–18.

Law.[98] A special kind of the informal Roman release — the agreement not-to-sue (*pactum non petendo*) — has survived in the Anglo-American agreement not-to-sue.[99]

§ 736 **Extinction of obligations: (4) recession.** An obligation is normally extinguished by performance. But if a contractual obligation was tainted ab initio with some inherent defect or vice, it was possible in Roman law to rescind it as injurious, thus extinguishing the obligation.[100] The nullity here meant is relative, not absolute: if it were absolute — that is, contravening the law itself — no obligation could have been created at all.[101] Rescission as a discharge of obligations is found in modern law, for instance the French, German, Spanish, Italian, and Anglo-American law.[102]

§ 737 **Extinction of obligations: (5) loss of the thing due (interitus rei). Vis major. Casus fortuitus.** In both Roman and modern law if a person is prevented from performance by no fault of his own,[103] his obligation is extinguished by impossibility of performance, which may arise from the destruction

[98] *Civil code* of France, 1282–8 ("remise de la dette"); Germany, 368; Spain, 1177, 1332, 1850; Italy, 1279–84; Japan, 519; California, 1530–33; Louisiana, 2130, 2199–2206; *Jaqua* v. *Shewalter*, 10 Ind. App. 234, 37 N. E. Rep. 1072; *Winter* v. *R. R. Co.*, 160 Mo. 159, 61 S. W. 606; Black, *Law dictionary*[2], p. 1011, "release".

[99] See *Dig.* 2, 14, 7, 8; *Dig.* 2, 14, 25, 1; Hunter, *Roman law*[4], pp. 642–3; Williams, *Inst. of Justinian*[2], p. 244. This pact is also a mode of *solutio* (performance), — defined supra § 729.

[100] Mackeldey (Dropsie), *Roman law*[14], § 187; Howe, *Civil law*[2], pp. 265–6.

[101] There were in Roman law two excellent illustrations of the rescission of contracts for injury or **lesion** (**laesio**) received: contracts of minors or persons under the age of majority, and sale. If a minor made a contract to his injury he could avoid it and be restored to his original condition: see supra §§ 447, 449 (*in integrum restitutio*); Mackenzie, *Roman law*[7], p. 155. And this Roman restitution of minors has descended into modern law (for instance the Anglo-American): Williams, *Inst. of Justinian*[2], p. 37 (contracts not to the advantage of an infant are void); *Civil code* of France, 1304 et seq.; Louisiana, 2221 et seq.; Italy, 1529 et seq. Lesion in sale is treated infra § 785.

[102] *Civil code* of France, 1304 et seq.; Spain, 1290 et seq.; Italy, 1529 et seq.; Schuster, *German law*, § 162; Black, *Law dict.*[2], p. 1025, "rescission"; Markby, *Elements of law*[5], § 275.

[103] If the accident happened through the negligence of the debtor, he was liable; *Dig.* 44, 7, 1, 4; *Dig.* 45, 1, 137, §§ 2–3.

of the thing due either by irresistible force or some fortuitous event. This Roman mode of extinguishing an obligation by impossibility of performance due to accident is found widely in modern law, for instance the French, German, Spanish, Italian, and Anglo-American law.[104]

1. *Vis major.* Irresistible force, in Roman law, was some unavoidable accident due to natural extrinsic forces, such as earthquake, flood, tempest, and lightning.[105] Our law has borrowed from the Roman the term "vis major" and its conception. Another equivalent expression therefor in Anglo-American law is "act of God".[106]

2. *Casus fortuitus.* A fortuitous event, in Roman law, was one proceeding from acts of man and which could be foreseen, such as war, fire, attacks of robbers.[107] Our law is like the Roman.[108]

Extinction of obligations: (6) compromise (transactio). § 738 In Roman law an agreement of compromise was simply the discontinuance or forbearance of a pending or proposed lawsuit[109] by the litigating parties mutually settling the con-

[104] *Civil code* of France, 1302; Louisiana, 2219–20; Germany, 701; Spain, 1182 et seq.; Italy, 298 et seq.; Story, *Bailments*, § 25; 10 *Am. and Eng. encycl. of law*[2], 176.

[105] "Vis naturalis veluti terrae motu: *Dig.* 19, 2, 59. "Violentia ventorum vel qua alia ratio quae vim habet divinam": *Dig.* 39, 2, 24, 4. "Omnem vim cui resisti non potest": *Dig.* 19, 2, 15, 2.

[106] *Nugent* v. *Smith*, 1 C. P. Div. 423; *Nicholls* v. *Marsland*, 2 Ex. Div. 1; *Williams* v. *Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Hays* v. *Kennedy*, 41 Pa. St., 378, 80 Am. Dec. 627; *Kuhnis* v. *Logging Co.* 98 Pac. Rep. (Wash.), 656; 2 Blackstone, *Comm.* p. 122; Broom, *Maxims*, p. 108; Story, *Bailments*, § 25; Williams, *Inst. of Justinian*[2], p. 178. Japanese law also is debtor to the Roman for this conception: *Civil code*, 161.

[107] "Ea, quae ex improvisu casu . . . accidunt": *Code* 9, 16, 1. "Casus . . . a nullo praestantur: *Dig.* 50, 17, 23. Casus extinguished an obligation: *Dig.* 45, 1, frag. 33; frag. 83, 5.

[108] 3 Kent, *Comm.* pp. 217, 300; Wharton, *Negligence*, §§ 113, 553; *The Majestic*, 166 U. S. Rep. 375.

[109] Opportunities for compromise exist: (1) prior to the issuance of the summons, (2) after the summons and until the appearance in court. "Qui in jus vocatus est duobus casibus dimittendus est: si quis ejus personam defendet, et si, dum in jus venitur, de ea re transactum fuerit": *Dig.* 2, 4, 22, 1.

troversy between themselves.[110] The French Civil Code repeats this Roman law conception as follows: "A compromise is a contract by which the parties put an end to a dispute which has arisen or prevent a dispute which is about to arise."[111]

The Roman contract of compromise ("transactio") has given its name as well as its principles to this French contract of "transaction", and to the Louisiana contract of "transaction or compromise".[112] It has also survived in other modern legal systems, for instance the Italian, German, Spanish, California, and Japanese law.[113]

The principles of the Roman compromise have also descended into the Common Law of England and the United States, being found in the two contracts of "compromise"[114] and "accord and satisfaction".[115] But our law allows an attorney-at-law to compromise a claim without direct instructions from the client,[116] while in Roman law it is doubtful if an attorney had this power.[117]

§739 **Extinction of obligations: (7) novation (novatio). Subrogation.** In Roman law an obligation was dissolved by renewal or novation when a new obligation was formed to replace the

[110] See *Code*, 2, 4, 38; *Dig.* 2, 15, 2–3; Hunter, *Roman law*[4], p. 549; Halifax, *Civil law*, ch. viii, no. 14. Compromise was an innominate real contract (infra §762); and it is also a mode of solutio or performance (supra §729). But compromise was quite different from a submission to arbitration (*compromissum, receptio arbitri*), see infra §740.

[111] Art. 2044 (Wright).

[112] *Civil code* of France, 2044–58; Louisiana, 3071–83.

[113] *Civil code* of Italy, 1764–77; Germany, 779, 782, 1822 (12); Spain, 1809–19; California, 1521 et seq. (accord and satisfaction): Japan, 695–6.

[114] As to this contract, see Williams, *Inst. of Justinian*[2], p. 243; *Foakes* v. *Beers*, 9 App. Cases, 605; *Colburn* v. *Groton*, 66 N. H. 151, 28 Atl. 95, 22 L. R. A. 763; *Attrill* v. *Patterson*, 58 Md. 226; *Bank* v. *McGeoch*, 92 Wis. 286, 66 N. W. 606; *Rivers* v. *Bloom*, 163 Mo. 442, 63 S. W. 812; *Sharp* v. *Knox*, 4 La. 456.

[115] As to this contract, see *Simmons* v. *Clark*, 56 Ill. 96, 101; *Costello* v. *Cady*, 102 Mass. 140; *Petty* v. *Allen*, 134 Mass. 265; *Memphis* v. *Brown*, 20 Wall. (U. S.), 308; Benjamin, *Prin. of contracts*[3], pp. 143–4.

[116] Williams, *Inst. of Justinian*[2], p. 243; *Matthews* v. *Munster*, 20 Q. B. D. 141.

[117] Imperial procurators were absolutely prohibited from so doing; they must first consult the Emperor: *Dig.* 2, 15, 13.

old one.[118] This mode of extinguishing an obligation has (§ 739) descended widely into modern law, including the French, German, Italian, Spanish, Japanese, and American.[119] Not only the principles of the Roman "novatio" but also its name have survived in the French "novation", the Italian "novazione", the Spanish "novación" and the English "novation". It was Bracton who introduced the term "novation" into the English Common Law.[120]

The scope of the Roman novation is succinctly repeated in Spanish law as follows: "Obligations may be modified: 1. By the change of their object or principal conditions. 2. By substituting the person of the debtor. 3. By subrogating a third party in the rights of the creditor." [121]

1. *Substitution of a new obligation for the old one* (*novatio*). Change of the obligation itself constitutes novation, strictly speaking. Here the old obligation is entirely extinguished or merged in the new obligation.[122] But in the law of Justinian a novation could take place only if it was expressly intended by the parties that this should be the aim of their agreement.[123]

2. *Substitution of a new debtor* (*delegatio*, *expromissio*, *novatio*). Another variety of novation occurs when the creditor receives a new debtor (expromissor) in place of the

[118] See *Inst.* 3, 29, 3; *Code*, 8, 48, 8; Hunter, *Roman law*[4], pp. 626–32.

[119] *Civil code* of France, 1271–81; Germany, 364, 414; Italy, 1267–78; Spain, 1143, 1156, 1203–13, 1224; Japan, 513 et seq.; Louisiana, 2181–98; California, 1530–31; Dakota, 863; *Hard* v. *Burton*, 62 Vt. 314, 20 Atl. 269; *McCartney* v. *Kipp*, 171 Pa. St. 644, 33 Atl. 233.

[120] Williams, *Inst. of Justinian*[2], p. 240. See supra vol. i, § 374, as to the 13th century Bracton.

[121] *Civil code* of Spain, 1203; Porto Rico, 1171 (quoted in the text).

[122] *Dig.* 4, 4, 27, 3. "Novatio est prioris debiti in alium obligationem vel civilem vel naturalem transfusio atque translatio, hoc est cum ex praecedenti causa ita nova constituitur, ut prior perimatur": *Dig.* 46, 2, 1, pr.

[123] This is *novation by stipulation:* see *Inst.* 3, 29, 3; *Code*, 8, 41 (42), 8. This statute applied also to cases of novation where a new debtor is substituted (*delegatio or expromissio*). Prior to Justinian the intention to make a novation was inferred or rejected by certain legal presumptions: see Gaius, 3, 177–9; *Inst.* 3, 29, 3; *Dig.* 46, 2, 9, 2; *Dig.* 46, 2, 28; *Dig.* 44, 7, 44, 6. As to *novation by expensilatio* (a literal contract obsolete in the law of Justinian, infra § 776), see Gaius, 3, 128–30.

(§739) original debtor.[124] Here the obligation itself remains the same, but the parties to it change.[125] This kind of novation must be expressly intended to have such an effect.[126] But no delegation of a new debtor can take place unless the creditor consents to the substitution: his consent is essential.[127] In this way the creditor is safeguarded against having to take an insolvent person.

3. *Substitution of a new creditor* (*cessio actionum, cessio nominum*): *subrogation.* Another variety of novation is the transfer to a third person of the right to receive payment from the debtor.[128] This is but the substitution of a new creditor for the old one.[129] The change of creditors effected by the transfer is valid without the consent of the debtor, who need not even know of it.[130]

This variety of the Roman novation is found in the modern law doctrine of subrogation in payment.[131] Subrogation is widely recognized in modern jurisprudence, for instance in French, Spanish, Italian, German, Japanese, and English law.[132] In subrogation the obligation is kept alive for the benefit of a third person paying a debt, by giving to him all the rights

[124] Gaius, 3, 176; Inst. 3, 29, 3. For illustrations of *delegatio* see *Code*, 8, 41 (42), 3; *Dig.* 46, 2, 12. This form of novation is sometimes termed *intercessio.*

[125] *Both* debtor and creditor might be changed by delegation: *Dig.* 46, 2, 11, pr; Hunter, *Roman law*[4], p. 631.

[126] *Code*, 8, 41 (42), 8 applied to *delegatio* and *expromissio.* See also *Dig.* 46, 2, 32; *Dig.* 46, 2, 8. §§4–5; *Dig.* 46, 2, 26; *Dig.* 45, 1, 56, § 7. Concerning rules as to *expromissio*, see *Dig.* 46, 2, 14, § 1; *Dig.* 46, 2, 5; *Dig.* 46, 2, 8, 1.

[127] *Code*, 8, 41 (42), 1. "Nec creditoris creditori quisquam invitus delegari potest": *Code*, 8, 41, (42), 6.

[128] Such a transfer includes all the subsidiary rights of the original creditor, unless otherwise agreed: *Dig.* 18, 4, 14, pr; *Dig.* 18, 4, 6.

[129] The subject of assignment of contracts is treated infra § 805.

[130] *Code*, 4, 39, 3. But should the debtor pay the original creditor before being notified of the assignment, his payment is valid: *Code*, 8, 16 (17), 4.

[131] Howe, *Civil law*[2], pp. 256–7. The term "subrogation" is of Canon Law origin (see supra vol. i, §§ 225–30).

[132] *Civil code* of France, 1249–52; Spain, 1203 et seq.; Italy, 1251–3; Louisiana, 2159–62; Germany, 268; Japan, 499 et seq.; Bispham, *Equity*[5], § 335; *Fuller* v. *Davis*, 184 Ill. 505, 56 N. E. 791; *Mansfield* v. *N. Y.*, 165 N. Y. 208, 58 N. E. 889.

of the original creditor, if unpaid.[133] Subrogation is either conventional (by agreement), or legal (equitable and without agreement — for instance when a second mortgage creditor pays a first mortgage creditor).[134]

Extinction of obligations: (8) submission to arbitration (receptio arbitri, compromissum). § 740 In Roman law an obligation as to which there was a dispute, was dissolvable by submitting the dispute to one or more arbitrators instead of litigating it in a court of justice.[135] Justinian made the award enforceable by an action at law.[136] The Roman submission to arbitration has widely survived in modern jurisprudence, for instance in French, German, Spanish, Louisiana,[137] and English law.[138] The Louisiana Civil Code restates the Roman doctrine as follows: "A submission is a covenant by which persons who have a lawsuit or difference with one another, name arbitrators to decide the matter and bind themselves reciprocally to perform what shall be arbitrated." [139]

Extinction of obligations: (9) set-off (compensatio, deductio). § 741 In Roman law it was possible to dissolve an obligation by balancing a claim with a counterclaim: for instance two persons indebted to each other could by set-off reciprocally extinguish their debts; if the debts were unequal, the greater was but partly diminished, while the lesser was entirely canceled.[140] The Louisiana Code of Practice thus restates the Roman conception of set-off: "Compensation, or set-off,

[133] See Black, *Law dict.*[2], "subrogation" (England and U. S.).

[134] *Id.*

[135] See on this subject, *Dig.* 4, 8; *Code*, 2, 55 (56); Mackeldey (Dropsie), *Roman law*[14], § 471; Amos, *Roman law*, pp. 188–9; infra vol. iii, § 1002.

[136] *Code*, 2, 55 (56), 5. See *Code*, 2, 55 (56), 4, which was partly repealed by *Nov.* 82, ch. 11.

[137] *Civil code* of France, 2123, *Code of Civil Procedure* of France, 1003–28 ("des arbitrages"); *Civil code* of Spain, 1820–27; Germany, 220, 1822 (12); Louisiana, 3099–3130.

[138] Robinson, *El. law*[2], § 244; *Duren* v. *Getchell*, 55 Me. 241; *Boyden* v. *Lamb*, 152 Mass. 416, 25 N. E. 609; *In re Curtis Castle Arbitration*, 54 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

[139] Art. 3099.

[140] "Compensatio est debiti et crediti inter se contributio": *Dig.* 16, 2, 1. See *Dig.* 16, 2, 3 and 5; *Inst.* 4, 6, 30; Gaius, 4, 64–8; *Code*, 4, 31; infra § 857.

(§741) is a mode of extinguishing debts which takes place when it happens that both the plaintiff and defendant are indebted to each other; each retaining, in payment of the sum due him, the amount which he owes to the other." [141]

The Roman doctrine of set-off has widely descended into modern jurisprudence, for instance the French, German, Italian, Spanish, Louisiana, and Japanese law.[142] The name itself as well as the principles of the Roman "compensatio", has survived in modern law, — for example in the French "compensation", the Italian "compenzatione", the Spanish "compensación" and the Louisiana "compensation".[143] The doctrine of "set-off", which is unknown to the English Common Law,[144] was finally introduced into England by statute in the 18th century[145]; and it is now firmly embedded in Anglo-American jurisprudence.[146]

For putting set-off into operation Roman law provided two ways, both of which contained the essential requisite that a set-off must take place with the knowledge or at the desire of the debtor and creditor: either the parties should plead their respective claims in the course of a lawsuit and successfully establish their demands[147]; or the parties should expressly agree to set off and extinguish their reciprocal claims.[148]

There were, in the Justinian Roman law, three general requisites of compensation[149]; and the influence of these is markedly traceable in modern law.[150] 1. Although the debts

[141] Art. 366. See also arts. 367–73.

[142] *Civil code* of France, 1289–99; Germany, 387–96; Italy, 1285–95; Spain, 1195–1202; Japan, 505 et seq.; Louisiana, 2207–16.

[143] *Id.*

[144] Bryant, *Code pleading*, § 197.

[145] 2 George II, c. 22 (1729).

[146] Williams, *Inst. of Justinian*[2], p. 281; Bryant, *Code pleading*, §§ 197 et seq.; *Sherman* v. *Hale*, 76 Iowa, 383, 41 N. W. Rep. 48; *Naylor* v. *Smith*, 63 N. J. Law, 596, 44 Atl. 649; *Willis* v. *Browning*, 96 Ind. 149; *Civil code* of Georgia, 2899.

[147] This is known as compensatio operating *ipso jure*: see *Dig.* 16, 2, frag. 21; frag. 4; frag. 10, pr; *Inst.* 4, 6, 30; *Code*, 4, 31, const. 4; const. 14, pr.

[148] See Sohm (Ledlie[3]), *Roman law*, p. 445.

[149] This term is used in the *Civil code* of Louisiana, 2130, 2207 et seq.

[150] See Bryant, *Code pleading*, §§ 200–207.

set off against each other should be of the same nature,[151] yet claims originally of a different nature which are reducible to a money value could be set off reciprocally.[152] But it was not necessary that the debts should arise from the same transaction: debts arising from different transactions could be set off.[153]

2. Only debts due and payable could be set off: for a future debt not matured cannot balance a debt that is due.[154] Moreover, a claim which was prescribed could not be set off: for an outlawed debt is no longer demandable.[155] But there were certain just exceptions to the rule that the debt to be set off must be due to the person who sets it up: for instance an heir could set off, as his own debt, a debt due to his ancestor[156]; and a surety of a principal debtor could set off against the creditor whatever is owed by that creditor to the principal debtor.[157]

3. Only debts which are liquidated — that is, are of a fixed amount or calculable — could be set off: a contested debt was not a liquidated debt.[158]

Extinction of obligations: (10) confusion. In Roman law an obligation was dissolved by confusion or merger when the § 742

[151] "In compensationem hoc solum vocatur, quod ejusdem generis et naturae, veluti pecunia cum pecunia": Gaius, 4, 66. "Si constat, pecuniam invicem deberi": *Code*, 4, 31, 4.

[152] This is a principle of the Justinian law; and it enabled that emperor to extend compensation (originally confined to actions *in personam*) to actions *in rem*: see *Code*, 4, 31, 14: *Inst.* 4, 6, 30. This will account for Williams' statement that the debts "need not be of the same nature": *Inst. of Justinian*[2], p. 281.

[153] Moyle, *Inst. of Justinian*, vol. i, 5th ed. p. 559; Williams, *Inst. of Justinian*[2], p. 281. The rule of the Early Imperial law was just the opposite: "ex eadem causa" (Gaius, 4, 61). And, although *Inst.* 4, 6, 39 repeats the above words of Gaius, it is now held that these words were imported into the Institutes by an oversight: Moyle, *Id.*

[154] *Dig.* 16, 2, 7. See *Code*, 4, 31, 9.

[155] "Quaecumque per exceptionem perimi possunt, in compensationem non veniunt": *Dig.* 16, 2, 14. But a natural obligation could be set off against a civil obligation ("etiam quod natura debetur, venit in compensationem"): *Dig.* 16, 2, 6.

[156] See supra § 662.

[157] *Dig.* 16, 2, 5.

[158] *Dig.* 16, 2, 8.

debtor and creditor became one and the same person, for instance when a creditor became by succession heir to his debtor and vice versa.[159] Whenever the principal obligation was extinguished by confusion, any *accessory* obligation — for instance suretyship[160] — was also extinguished: but the opposite case was not true — extinction of the accessory did not extinguish the principal obligation. Confusion as a mode of extinguishing obligations is found in modern law, such as the French, Italian, Spanish, Japanese, Louisiana, and Anglo-American.[161] For example, the Japanese Civil Code provides that "if the obligation, right, and duty become vested in the same person, the obligation is extinguished."[162]

§ 743 **Extinction of obligations: (11) joinder of issue (litis contestatio).** In Roman law, joinder of issue in a lawsuit (or the reaching of that point in the pleadings of the parties where the facts in controversy are affirmed on the one side and denied on the other) extinguished the original obligation and gave birth to a new one.[163] In our law the arising of the new obligation is deferred until judgment: then the old obligation is extinguished. In both Roman and Anglo-American law the judgment of a court is known as *res judicata*.[164]

§ 744 **Extinction of obligations: (12) bankruptcy.** The Roman law of bankruptcy has already been considered.[165] In reality bankruptcy was suspensive rather than extinctive of obligations. Bankruptcy is found in modern law, including the American.[166]

§ 745 **Extinction of obligations: (13) extinctive prescription.** In Roman law an obligation was barred or extinguished by the

[159] *Dig.* 46, 3, 75; *Dig.* 46, 1, 21, 3; *Dig.* 46, 3, 93, 2; Hunter, *Roman law*[4], p. 649; Howe, *Civil law*[2], pp. 261–2.

[160] This contract is treated infra § 768.

[161] *Civil code* of France, 1300–1302; Italy, 1296–7; Spain, 1192–4; Louisiana, 2217–18; Japan, 520; Benjamin, *Prin. of contracts*[3], pp. 127–8.

[162] Art. 520 (Lönholm).

[163] Gaius, 3, 180–81; Hunter, *Roman law*, pp. 650, 1014–16; Amos, *Roman law*, p. 195. See infra §§ 856–7. Litis contestatio may also be regarded as a mode of performance (*solutio*, — supra § 729).

[164] Gaius, 3, 181; Kent, *Comm.* p. 120; Black, *Law dict.*[2] "res judicata."

[165] Supra §§ 716–17.

[166] See *Id.*

limitation of actions: in other words, no action could be brought to enforce an obligation after the expiration of the statute of limitations.[167] This constituted extinctive prescription.[168] And this kind of prescription has descended widely into modern jurisprudence.[169] (§ 745)

The earliest Roman statute of limitations for obligations was enacted late during the Empire by the Emperor Theodosius II in A.D. 424. Prior to this 5th century statute, actions derived from the law for citizens (jus civile)[170] and actions created by the praetorian law[171] for the recovery of property were perpetual[172]; but praetorian penal actions must be brought within a year.[173] The statute of Theodosius fixed the period of 30 years for the extinction of all actions, in personam as well as in rem.[174] And in the law of Justinian this was the usual prescriptive period for the limitation of actions, with two exceptions: the action on a hypothec was limited to 40 years,[175] and a claim of freedom was imprescriptible.[176] The statutes of limitations in modern law have considerably reduced the period of limitation as to many actions in personam, although the Roman period of 30 years is retained in some instances.[177]

[167] Hunter, *Roman law*[4], pp. 645–9; Mackeldey (Kauffmann), *Roman law*[12], p. 203, note.

[168] See supra § 647.

[169] Blackstone, *Comm.*, vol. ii, pp. 195–9, 263–6; *Civil code* of France, 2219 et seq.; Spain, 1940 et seq.; Germany, 937 et seq.; Italy, 2105 et seq.; Portugal, 517 et seq.; Austria, 1451 et seq.; Mexico, 1079 et seq.; Chile, 2498 et seq.; Argentina, 3999 et seq.; Louisiana, 3472 et seq.; Switzerland, 661 et seq.; 728; Japan, 162 et seq.; Quebec, 2183 et seq.

[170] See supra vol. i, §40.

[171] See supra vol. i, § 41.

[172] *Inst.* 4, 12, pr.; Hunter, *Roman law*[4], p. 646.

[173] *Id.* The penal actions depended upon the jurisdiction of the praetor, whose term of office was one year.

[174] *Cod. Theod.* 4, 14, 1; *Code*, 7, 39, 3. But in the year 491 the Emperor Anastasius enacted a law making 40 years the prescriptive period for cases not covered by Theodosius' statute: *Code*, 7, 39, 4.

[175] *Code*, 7, 39, 7, § 1 (A. D. 528). See *Code*, 7, 39, 9. Hopothec is treated supra § 615.

[176] *Code*, 7, 22, 3. As to freedom, see supra § 434.

[177] See supra § 655. On the subject of prescription see infra vol. iii, § 998.

TITLE II

CONTRACTS (CONTRACTUS, PACTA, CONVENTIONES)

CHAPTER I

GENERAL PRINCIPLES OF CONTRACTS

Contract defined. In both Roman and modern jurisprudence a contract is an agreement between two or more persons giving rise to an obligation enforceable by an action at law.[1] The terms "obligation" and "contract" are often confused in Anglo-American law. The contract is the *cause* of an obligation, — it is merely the transaction creating an obligation. The obligation is the *effect* of entering into a contract. §746

Anything which is impossible, illegal, or contrary to good morals cannot be the subject of a contract, in either Roman or modern law.[2] The incidental elements of a contract relating to time, condition, place, or stipulated penalty may impose additional burdens on one or all parties to the obligation.[3] The English Common Law is vastly indebted to the Roman for its law of contracts. Bracton's treatment of contracts markedly reveals the influence of Roman law[4]: he frequently borrows his text word for word from the Institutes of Justinian, and he is also debtor to the Digest and the Italian Glossator Azo.[5]

[1] ROMAN LAW: see *Inst.* 3, 13, pr.; *Inst.* 3, 19, 5; *Dig.* 2, 14, frag. 7, pr. §§ 1–4. But there were agreements (known as *pacta* — see infra § 807) producing an actionable obligation: see *Dig.* 2, 14, frag. 1, pr.; frag. 7. MODERN LAW: Robinson, *Elementary law*[2], §§ 158, 159 (American).

[2] ROMAN LAW: *Inst.* 3, 19, §§ 1 and 11. MODERN LAW: Robinson, *El. law*[2], § 159; Benjamin, *Principles of contract*[3], p. 87.

[3] An instance is given in *Inst.* 3, 19, 13, — namely performance of a contract after the death of the promisor or promisee.

[4] See first half of his book iii, ff. 98b–104b.

[5] See supra vol. i, §§ 137, 138, 213, 374.

§ 747 **Elements of a contract: (1) parties legally competent to contract.** In both Roman and modern law the essentials of a valid contract are four in number: parties legally competent to contract, a voluntary meeting of the minds, the form prescribed by law, and a consideration.[6]

In Roman law all persons who were insane or below a certain age were absolutely incapable of contracting[7]; and in modern law such classes of persons may not have contractual capacity.[8] Women could not, in Roman law, enter upon a contract of suretyship for their husbands or ordinarily bind themselves as sureties[9]; and the influence of this Roman rule still partly lingers in the modern law of South Africa and of Scotland.[10]

In Roman law a person in power could not contract with the head of the family in whose power he was.[11] Some persons had an imperfect incapacity, such as a ward, a minor, or a spendthrift under guardianship: here the guardian either acted for or assisted the person of imperfect capacity[12]; and some modern law guardians may exercise similar authority.[13] In Roman law physicians could not sue for remuneration promised during a patient's illness, although they could obtain remuneration promised after the recovery of the patient.[14] In the law of England there is somewhat of an analogous rule: physicians who are Fellows of the Royal College of Physicians cannot sue for fees.[15]

[6] Roman law required a consideration only in certain contracts: see infra § 750.

[7] *Inst.* 3, 19, §§ 8, 9, 10. See supra §§ 433, 445, 446.

[8] See Robinson, *El. law*[2], § 158.

[9] By the SC. Velleianum (A.D. 46): *Dig.* 16, 1, frag. 2, pr. and §§ 4–5; frag. 27, § 1; frag. 32, § 1; frag. 40. See supra § 476, second note; and infra "suretyship", § 769.

[10] Supra § 476, second note.

[11] *Inst.* 3, 19, 6.

[12] *Inst.* 1, 21, pr. and § 2; *Inst.* 1, 23, pr.; *Dig.* 45, 1, 6. See supra §§ 522, 531, 533.

[13] Robinson, *El. law*[2], §§ 158, 182, 185, 186.

[14] *Code*, 10, 53 (52), 9. The word for physicians is "archiatri", literally 'chief physicians'.

[15] 49 and 50 Vict. ch. 48, § 6; *Gibbon* v. *Budd*, 2 H. & C. 62; Williams, *Inst. of Justinian*[2], p. 170.

Elements of a contract: (2) a voluntary meeting of the minds (consensus). Mistake; intimidation; fraud. Another requisite of a valid contract, in both Roman and modern law, is that there must be a voluntary meeting of the minds of the parties to the contract.[16] If there is a mistake (*error*) as to the subject-matter of the agreement so that each party presupposes a different subject-matter, such contract is wholly void in both Roman and modern law — there is no meeting of the minds.[17] § 748

The object of an expression of will may be to produce either a right in rem or a right in personam, or even to extinguish a right of property. Transactions productive of such legal consequences are now frequently termed juristic acts.[18] Ordinarily in both Roman and modern law the *motive* which leads to a transaction productive of legal effect is immaterial. For instance to buy a book thinking it treats of medicine, whereas it really treats of law, does not invalidate the purchase.[19] But there are two exceptional cases where the motive of a juristic act is material: these are intimidation and fraud.

1. Intimidation (*metus, vis*). This is also described as threats or duress. To force a person to act through fear arising from a threat is treated, in both Roman[20] and modern law, as ground for canceling and avoiding the act in question and restoring the victim to his original position.[21]

[16] "Et est pactio duorum pluriumve in idem placitum et consensus"; *Dig.* 2, 14, 1, 2. It was not always necessary that the parties be present: a consensual contract (defined infra § 779) could be made, as in modern law, by letter or messenger: Gaius, 3, 136; *Inst.* 3, 22, 2; compare *Inst.* 3, 19, 12.

[17] Here is an *error in corpore*, which makes consent impossible. ROMAN LAW: *Inst.* 3, 19, 5. The person making the mistake could obtain a restoration to his original condition (in *integrum restitutio*): see supra §§ 449, 450. MODERN LAW: Robinson, *El. law*[2], § 158. As to the recovery of money paid by mistake, see infra § 811.

[18] One section of the *Civil code* of Argentina is "Juristic acts": see book ii, section 2, articles 896 et seq.

[19] *Falsa causa non nocet.*

[20] Originally by the praetorian Roman law. See supra vol. i, §§ 41, 44.

[21] ROMAN LAW: *Dig.* 4, 2, 1, pr., "ait praetor: 'quod metus causa gestum erit, ratum non habebo' ": *Dig.* 4, 2, 14, § 3. The person intimi-

2. Fraud (*dolus, dolus malus, fraus*). To induce a person by deliberate deception[22] to enter upon a transaction is treated, in both Roman[23] and modern law, as ground for nullifying all the legal effects of the juristic act and restoring the injured party to his original position.[24]

§ 749 **Elements of a contract: (3) form. Nudum pactum.** In Republican and Early Imperial Roman law the form of a contract was of the greatest importance: for then consent alone did not create an obligation — a contract gave rise to an obligation only by being executed in the form[25] prescribed by law. Moreover an obligation created by a formal contract could be extinguished only by observing other prescribed formalities.[26]

But in the law of Justinian the ancient Roman formal contracts are not found[27]: form was of little importance as an essential condition of a contract, and no formality was necessary to extinguish an obligation. The essence of a contract in the Justinian law was consent. The evolution of contract into a formless agreement was as follows:

1. *Nudum pactum.* According to the Republican and Early Imperial law an agreement not made in the form[28] prescribed by the law for citizens gave rise to no enforceable

dated could obtain a restoration to his original condition (*in integrum restitutio*): see supra §§ 449, 450. MODERN LAW: Robinson, *El. law*[2], § 158. Intimidation as a tort, giving rise to an action ex delicto for damages, is treated infra § 831.

[22] Fraud is defined by the Roman jurist Labeo (supra vol. i, § 97) as "omnem calliditatem fallaciam machinationem ad circumveniendum fallendum decipiendum alterum adhibitam": *Dig.* 4, 3, 1, § 2.

[23] Originally by the praetorian law.

[24] ROMAN LAW: *Dig.* 4, 3, 1, 1, — "verba autem edicti talia sunt: 'quae dolo malo facta esse dicentur, si de his rebus alia actio non erit et justa causa esse videbitur, judicium dabo.'" For the use of "fraus", see *Dig.* 6, 1, 63; *Dig.* 26, 10, 7, 1; *Dig.* 46, 1, 52, 1; *Dig.* 37, 15, 5. MODERN LAW: Robinson, *El. law*[2], § 158. Fraud as a tort, giving rise to an action ex delicto for damages, is treated infra § 830.

[25] Called *causa civilis*. This obligation was termed *obligatio civilis*.

[26] See supra § 735.

[27] Except the modified stipulatio and possibly cautio: see infra §§ 767, 778.

[28] In other words, *causa civilis*.

obligation, not even if a good consideration was present.[29] (§ 749) Such an agreement was termed in this era of Roman law a "nudum pactum" — that is, an agreement not enforceable by an action at law.[30] In the 13th century the term *nudum pactum* was introduced into English law by Bracton. Subsequently it underwent a change of meaning: two centuries or so after Bracton, *nudum pactum*, in the English Common Law, had come to signify an agreement without consideration[31] — a meaning which is very different from the Roman informal non-actionable agreement known as "nudum pactum". Both the English and the Roman law agree, however, on the result: a *nudum pactum* is non-enforceable by an action.[32]

2. *Pactum vestitum.* The next step in the Roman evolution of contract into a formless agreement was the enforcement of informal or formless agreements (nuda pacta). Many of these, although bad in or devoid of form, were subsequently, owing to the progress of jurisprudence, made actionable by praetors and Emperors. And such pacta are now known as *pacta vestita*, agreements clothed with an action.[33] A good illustration of a pact made actionable was hypothec.[34] And these praetorian enforceable consensual agreements, together with the consensual contracts established by the law for citizens,[35] constituted the group of consensual contracts of the law of Justinian, the essence of which was consent and not form.

[29] Such a duty or right was often called an *obligatio naturalis*, and it was regarded as an imperfect obligation. But it could serve as a basis for an enforceable agreement, or as a defense to a suit: see *Dig.* 2, 14, 7, 4; *Dig.* 12, 6, 64.

[30] "Nuda pactio obligationem non parit," etc.: *Dig.* 2, 14, 7, 4. But certain *pacta*, particularly *hypotheca* (supra § 628), subsequently became actionable in Roman law. The Roman law maxim quoted above is evidently the parent of the English Common Law "ex nudo pacto non oritur actio," — Broom, *Legal maxims*, p. 503.

[31] See *Doctor and student* (1530); Holmes, *Common Law*, p. 253.

[32] See Williams, *Inst. of Justinian*[2], p. 169.

[33] See Hunter, *Roman law*[4], p. 115; Roby, *Roman private law*, vol. ii, p. 114. *Pacta legitima* were those sanctioned by imperial statutes.

[34] Treated supra § 615. Other instances are the *pactum de dote constituenda* (supra § 478, infra § 807); the *pactum donationis* (supra § 657, infra § 807); Mackeldey (Dropsie); *Roman law*[14], § 462.

[35] *Jus civile:* see supra vol. i, § 40.

§ 750 **Elements of a contract: (4) consideration.** The modern doctrine of consideration is an evolution of the Roman law conception of *causa*. That which made a contract actionable was "causa"[36] (literally, the cause or inducement): if the Romans had generalized the common elements of the facts making a contract actionable, they would have attained to a fully developed doctrine of consideration. As it was, Roman law but partially worked out the necessity of a consideration, which it required in certain contracts.[37] Modern law has simply completed the evolution of this Roman doctrine by expressly making consideration a requisite for every contract.[38]

Blackstone himself suggested a Roman origin for the English doctrine of consideration.[39] An instance of the early close identification of the English consideration with the Roman causa is seen in the reign of Elizabeth when "the word 'cause' was used for consideration."[40]

[36] "Sed cum nulla subest causa, propter conventionem hic constat non posse constitui obligationem": *Dig.* 2, 14, 7, § 4. See also *Id.* § 2.

[37] A *valuable* consideration was required in all consensual contracts (infra §§ 779–812) except mandatum: Hunter, *Roman law*[4], p. 490; Williams, *Inst. of Justinian*[2], pp. 168, 198. And a bad or illegal consideration made a contract void: *Code*, 4, 7, 5; *Code*, 4, 7, 1; Hunter, *Id.*[4], p. 598. But in the contract of stipulation (infra § 767), probably because of its formal origin, no consideration was necessary in Republican and Early Imperial Roman law. The gratuitous character of mandatum (infra § 800) may explain why the Roman jurists never worked out a theory of consideration. Roman law finally recognized *pietas* (Dig. 12, 6, 32, 2) or *gift* (Hunter, *Id.*[4], p. 550) as a causa, and made a *pactum donationis* actionable: this explains the origin of "contrats de bienfaisance" in French law (*Civil Code*, 1105), which scarcely exist in English law. A consideration existed also in some of the Roman real contracts (infra §§ 753–65).

[38] See Robinson, *El. law*[2], § 158.

[39] *Commentaries*, vol. ii, p. 445. He correctly cites the Roman innominate contracts (infra § 760) as an instance of Roman contracts with a valuable consideration. CONTRA: Mr. Justice Holmes' valuable theory that the English consideration grew out of the "transaction witnesses" and the "secta" (*Common Law*, pp. 253 et seq.), if provable, would show that the Roman law merely supplied the terms "causa" and "nudum pactum" (supra § 749), which acquired a special meaning in the English Common Law.

[40] Holmes, *Common Law*, p. 286. On the subject of consideration see Peterson, *Evolution of causa in the contractual obligations of the Civil Law*, Bulletin of Univ. of Texas, no. 46, Jan. 1, 1905; Drake, *Consideration*

Classification of contracts. In Roman law, contracts were § 751
divided into four classes: real, verbal, literal, and consensual.[41] If a contract was concluded by the delivery of a thing, it was called a real contract; if by a set form of words alone, a verbal contract; if by writing alone, a literal contract; if by consent alone, a consensual contract.[42]

v. *causa in Roman-American law*, Mich. Law Review, Nov., 1905; Lee, *Cause and consideration in the Quebec civil code*, 25 Yale Law Journal, p. 536; Pollock, *Contracts*, ch. iv; 1 Spence Eq., 186; 2 Stephen Comm. bk. ii, part ii, ch. v.; Anson, *Contracts*, part ii. ch. ii, section iv.

[41] Gaius, 3, 89; *Inst.* 3, 13, 2.

[42] Gaius, 3, 90, 92, 128, 136; *Inst.* 3, 14, pr.; *Inst.* 3, 15, pr.; *Inst.* 3, 21, pr.; *Inst.* 3, 22, 1.

CHAPTER II

REAL CONTRACTS

§ 752 **Real contracts defined and classified.** In Roman law, real contracts were made by acts — in other words, the binding force of real contracts was the delivery of something (*res*).[1] Although Bracton — the father of the English Common Law — uses in his classification of contracts the term "real" contract,[2] this expression is no longer used in Anglo-American law.[3] Real contracts were either nominate — that is, having a special name in the law, or innominate — that is, without any name. The nominate are the earlier real contracts.

1. NOMINATE REAL CONTRACTS

§ 753 **Nominate real contracts defined and enumerated. Their survival in modern law.** In a nominate contract the property delivered was returned either actually, or in kind — that is, a return was made of similar things. The Roman nominate real contracts were loan, deposit, and pledge. These contracts, as found in the Justinian law, have descended into every system of modern civilized law,[4] including the English Common Law which has bestowed upon them the distinctive name of bailments.[5]

[1] Gaius, 3, 90; Inst. 3, 14, pr. See Plesnila, *Analyse critique de la théorie des contrats réels*, Paris, 1910.

[2] Bracton, iii, 1, ch. 2, § 1. See supra vol. i, § 374.

[3] The most like the Roman contract *res* was the English Common Law writ of "real covenant," abolished in England by 3 and 4 William IV, ch. 27: Williams, *Inst. of Justinian*[2], p. 172.

[4] As to German law, see Schuster, *Liabilities of bailees according to German law*, 7 Law Quart. Rev., p. 188.

[5] There is, however, a conflict or authority as to the origin of the English bailments: Lord Holt (in *Coggs* v. *Bernard*, Lord Raymond's Rep. 912), Sir William Jones (in *Bailments*, 1781), and Lord Esher (in *Nugent* v. *Smith*, 1 C. P. Div. 28) claim a Roman origin; but Mr. Justice Oliver Wendell Holmes (in *Common Law*, 1882) claims a purely Teutonic origin.

(1) Loan

Contracts of loan: (1) nexum. In Roman law there were several varieties of loan: namely nexum, mutuum, maritime loan, and commodatum. All these contracts, except nexum, have descended into modern law.[6] The earliest Roman real contract was nexum. It belongs to the period of the Ancient Roman law.[7] Nexum was the parent of all real contracts. It was the only one of the Roman real contracts which was formal: to effect a loan by nexum the ceremonious conveyance by money and the balance (*mancipatio per aes et libram*) was necessary.[8] The obligation of nexum was discharged in the same way as it was created.[9] Nexum became obsolete late in the 4th century B.C.,[10] — a hundred years prior to the invasion of Italy by Hannibal. Nexum is not found in the Imperial Roman law. § 754

Contracts of loan: (2) mutuum. The SC. Macedonianum as to loans. Interest and compound interest. The Roman mutuum[11] was a loan for consumption of things capable of being weighed, measured, or numbered — such as food, wine, oil, money[12] — on condition of a return in kind.[13] The borrower was regarded as practically the owner, and he must make a return of equivalent things, even if the property received be destroyed by accident.[14] The Roman mutuum is found in modern law, for instance in the English Common Law contract of loan.[15] § 755

[6] See infra vol. iii, § 1003.

[7] See supra § 416.

[8] Hunter, *Roman law*[4], p. 459. See supra § 570.

[9] See supra § 735.

[10] By the enactment of the *lex Poetelia de nexis*, 325 or 313 B. C. As to the date, see Girard, *Droit romain*[5], p. 484; Hunter, *Roman law*[4], p. 62.

[11] Gaius' derivation of *mutuum* is *meum-tuum* (mine becomes yours): Gaius, 3, 90.

[12] This was termed "pecunia numerata": Gaius, 3, 90.

[13] *Inst.* 3, 14, pr; *Dig.* 12, 1, frag, 3; frag. 2, pr. The action arising from this contract was called *condictio*: see *Inst. Id.*

[14] *Inst.* 3, 14, 2. In a *mutuum* the legal remedy or proper action at law to employ was the *condictio certi*, called also *condictio ex mutuo*, or *actio mutui* (*Code*, 7, 35, 5).

[15] Williams, *Inst. of Justinian*[2], p. 172.

(§ 755) The Imperial Roman law forbade one class of persons to contract loans of money: by the senatusconsultum Macedonianum, a statute enacted during the reign of either Claudius or Vespasian,[16] money lent to persons under paternal power could not be recovered.[17] The purpose of this legislation was to check the growing evil of extravagance by sons, who, when hard pressed by debts, were often tempted to plot against their fathers' lives.

In Roman law the borrower might specially agree to pay interest (*usurae*, *faenus*,[18] *versura*), not in excess of the legal rate.[19] By the Law of the XII Tables[20] the legal rate of interest was fixed at 10% per annum.[21] A little over a century later it was reduced to 5%.[22] A few years later it was entirely prohibited.[23] But this legislation was futile, — laws to suppress interest always fail. In Cicero's time and at the end of the Republic the legal rate was 12%; this was the legal rate during the Empire.[24] In the time of Justinian the

[16] Tacitus, *Ann.* 11, 2; Suetonius, *Vesp.* 11.

[17] *Inst.* 4, 7, 7; *Dig.* 14, 6, 1 (contains words of the statute). See *Dig.* 12, 1, 14; *Dig.* 14, 6, frag. 3, § 3; frag. 7, § 3; supra § 506, 446 (on the *patria potestas*).

[18] Also spelled "foenus", "fenus".

[19] See *Dig.* 22, 1, 30; *Code*, 4, 32, 11 (12); *Nov.* 136, 4; Hunter, *Roman law*[4], pp. 652–3; Amos, *Roman law*, pp. 218–9. The agreement to pay interest was usually made formally by a stipulation (infra § 767), although in a few cases the agreement might be made by a pact (supra 749).

[20] 449 B. C.; see supra vol. i, § 37.

[21] "Unciario fenore": Tacitus, *Ann.* 6, 16. This meant an ounce (uncia) in the pound (as), that is, one-twelfth of the principal, or 8⅓% annually: Niebuhr, *Hist. Rom.*, iii, 57; Rein, *Röm. Privatrecht*, p. 304; Smith, *Dict. of antiq.*[3], etc. "fenus," vol. i, p. 834. But this was the rate for a year of only ten months; for a full year the rate would have been 10%: such is the prevailing view of Niebuhr, supported by Huschke and Mommsen. But other authorities hold that the rate of 8⅓% applied to the full year: on this controversy, see Smith, *Id.* Hunter's statement (*Roman law*[4], p. 653), that this rate was 12% per annum is not well founded.

[22] Tacitus, *Ann.* 6, 16.

[23] By the *lex Genucia*, 341 B. C.

[24] Paulus, *Sent.* 2, 14, 3; Smith, *Dict. of antiq.*[3], "fenus", vol. i, pp. 834, 836.

maximum legal rate was the same, 12%, although ordinarily the legal rate varied from 4% to 8%.[25]

Payment of interest exceeding the legal rate was not void; the excess was either applied to the principal (*sors*, *caput*), or if there remained no principal, the excess was recoverable.[26] Compound interest (*usurae usurarum*, *anatocismus*[27]) was always prohibited in Roman law.[28] Many of the rules of the Roman law of interest have survived in Anglo-American law.[29]

Contracts of loan: (3) maritime loan (nauticum faenus, trajecticia pecunia). § 756 In Roman law a loan of money at interest could be made for the purchase of merchandise to be transported across the sea at the risk of the lender, repayment of the money to be made by the borrower if the goods arrived safely at the port of destination.[30] Originally the legal rate of interest for maritime loans was unlimited[31]; after several centuries Justinian fixed it at 12%.[32] The influence of the Roman maritime loan is still felt in modern law, for instance in the Anglo-American maritime contracts of bottomry and respondentia.[33]

Contracts of loan: (4) commodatum. § 757 When something is lent free for its legitimate use, for instance silverware for a supper, on condition that the identical thing be returned after

[25] *Code*, 4, 32, 36; *Nov.* 32. For maritime loans (infra § 756) the rate was 12%; for loans to merchants and to persons in business, 8%; for loans to persons not in business, 6%; for loans to persons of high rank and to farmers, 4%. For a full explanation of the Roman technical words for these rates of interest, see Mackeldey (Dropsie), *Roman law*[14], § 382, note 3.

[26] *Dig.* 22, 1, 20; *Dig.* 22, 1, 29; Paulus, *Sent.* 2, 14, 3.

[27] This is a Greek word used as a Latin word by Cicero: *Att.* 5, 21, 11.

[28] *Code*, 4, 32, 28. Justinian forbade the centuries-old practice (noticeable even in Republican times) of evading the ancient law by agreements converting interest into principal which would bear interest: *Code*, 4, 32, 28. On the subject of compound interest, see also *Dig.* 22, 1, 29; *Dig.* 12, 6, 26, 1; *Code*, 7, 54, 3, pr.

[29] Williams, *Inst. of Justinian*[2], p. 231.

[30] *Dig.* 22, 2, 1 and 3; *Code*, 4, 33, 5 (4) and 4 (3). This contract of loan was really a species of marine insurance, see infra § 806.

[31] Paulus, *Sent.* 2, 14, 3.

[32] *Code*, 4, 32, 26, 2.

[33] See Blackstone, *Comm.* vol. ii, p. 458; Black, *Law dictionary*[2], "bottomry"; Parsons, *Contracts*[8], vol. ii, p. 390, vol. iii, p. 146.

being used, this constituted the Roman contract of commodatum or gratuitous loan.[34] It originated in the praetorian law.[35] The borrower[36] was responsible for the slightest neglect (culpa levis) — that is, he must exercise the greatest care.[37] But he was not responsible for loss due to unavoidable accident[38]; the thing lent is still owned by the lender.[39] If payment was made for the use of the thing lent, the contract was not a gratuitous loan but a letting and hiring.[40] The Roman commodatum has survived in modern law, for instance in that Anglo-American bailment called "commodatum".[41]

(2) Deposit (Depositum)

§ 758 **Nature and scope of deposit. Sequestration.** When the owner of a thing gives it to another person for safe-keeping without remuneration, this constituted the Roman depositum.[42] It originated in the praetorian law.[43] The person receiving the thing, the depositee,[44] must restore it on demand to the depositor.[45] Gross negligence on the part of the depositee made him liable; ordinary diligence relieved him from lia-

[34] *Inst.* 3, 14, 2; Hunter, *Roman law*[4], pp. 474–8. The proper action to enforce the duties of the borrower was the *actio commodati directa.* The duties of the lender were enforceable by either the *actio commodati* or the *actio utilis commodati contraria* (as to the latter, see *Dig.* 13, 6, 21, pr.).

[35] *Dig.* 13, 6, 1, pr. (contains the words of the Praetor's Edict). See supra vol. i, §§ 41, 60, 61.

[36] *Commodatarius.*

[37] *Inst.* 3, 14, 2.

[38] *Id.* See supra § 737 (*vis major* and *casus fortuitus*).

[39] *Commodator.*

[40] *Inst.* 2, 14, 2. *Locatio et conductio* is treated infra § 793.

[41] Williams. *Inst. of Justinian*[2], p. 175; *Coggs* v. *Bernard*, Lord Raymond's Reports, 909; Parsons, *Contracts*[8], vol. ii, pp. 115–16.

[42] *Inst.* 3, 14, 3; *Dig.* 16, 3, frag. 1, §§ 8 and 45. The proper action to bring against the depositee was either the *actio depositi directa* or the *actio utilis depositi directa* (as to the latter, see *Code*, 3, 42, 8; Paulus, *Sent.* 2, 12, 8). The duties of the depositor were enforceable by the *actio depositi contraria.*

[43] *Dig.* 16, 3, 1, 1 (contains the words of the Edict). See also supra vol. i, §§ 41, 60, 61.

[44] "Depositarius".

[45] *Inst.* 3, 14, 3. The same word "depositor" is used in Roman law.

bility.[46] The reason for this is because the ownership of the thing deposited still belongs to the depositor.[47] But if the depositee was paid for his services, the deposit was treated as if one of letting and hiring.[48] The Roman depositum has survived in modern law, for instance in the Anglo-American bailment called "depositum."[49]

There was in Roman law a special kind of depositum which was very important — namely sequestration (*sequestratio*), or the deposit of a thing in dispute with some impartial person until a settlement of the controversy by judicial decision or otherwise.[50] The Roman sequestration has survived in the modern law of Continental Europe and countries deriving their jurisprudence therefrom, for instance the French, Italian, Spanish, Quebec, and Louisiana.[51]

(3) Pledge (Pignus, Vadium)

Nature and scope of pledge. In both Roman and modern law, pledge is a contract by which a debtor gives something to his creditor as security for the debt, on condition that when the debt is paid the thing shall be returned.[52] Pledge has already been considered.[53] § 759

[46] *Inst. Id.*

[47] It was thus distinguished from a *mutuum* (supra § 754): *Dig.* 16, 3, 17, 1. The depositee, unlike the borrower in a commodatum (supra § 757), was not allowed to use the thing received: *Code*, 4, 34, 3 and 4.

[48] *Dig.* 16, 3, 1, § 8. *Locatio et conductio* is treated infra § 793.

[49] *Coggs* v. *Bernard*, 1 Lord Raymond's Rep., p. 909; Williams, *Inst. of Justinian*[2], p. 179; Parsons, *Contracts*[8], vol. ii, pp. 97–104.

[50] See *Dig.* 41, 2, 39; *Dig.* 16, 3, frag. 7 and 5; Hunter, *Roman law*[4], pp. 383–4. The *sequester* was probably entitled to use those actions known as the 'possessory interdicts'.

[51] *Civil code* of France, 1956 ("séquestre"); Italy, 1870 ("sequestro"); Spain, 1785 ("secuestro"); Porto Rico, 1687 ("sequestration"); Quebec, 1794 ("sequestration"); Louisiana, 2972 ("sequestration").

[52] ROMAN LAW: *Inst.* 3, 14, 4. MODERN LAW: Williams, *Inst. of Justinian*[2], p. 113; *Coggs* v. *Bernard*, Lord Raymond's Rep. p. 909.

[53] Supra §§ 612, 616, 618–20; infra vol. iii, § 996.

2. INNOMINATE REAL CONTRACTS

§ 760 **Innominate real contracts defined.** In Roman law the innominate contracts, as the term itself indicates, were those having no special name. They were transactions based on mutual consent followed by a part performance, which enabled the other party to demand a counter-performance: in other words, they were formed by the exchange of things or services.[54] But in an innominate contract — unlike a nominate contract — something *different* was given in return: in other words, performance and counter-performance were not of the same kind. If one party performed his part, he was thereby entitled either to sue the other party for performance[55] or to abandon the contract and regain whatever had been given by him.[56] Although Bracton employs the expression "innominate contracts",[57] the term is no longer used in Anglo-American law.[58]

The Roman jurist Paulus, in a well-known passage, has endeavored to tersely describe all the varieties of innominate contracts.[59] His classification is as follows: 1. "I give something to you in order that you may give something to me": this innominate contract *do ut des* is analogous not only to mutuum and commodatum,[60] but also to deposit, to sale,

[54] The innominate contracts were generally enforced by the *actio in factum praescriptis verbis:* see *Dig.* 19, 5 "De praescriptis verbis," etc., §§ 2–3. As to this action, see also *Code,* 4, 64 "De . . . praescriptis verbis"; *Bas.* 20, 4 "De actione praescriptis verbis"; Audibert, *Sur les différents noms de l'action praescriptis verbis* (*Mélanges Gérardin,* p. 21, Paris, 1907); Sohm (Ledlie[3]), *Roman law,* p. 381, note 6 (discusses the opinion of Gradenwitz who gives this action a Byzantine origin).

[55] By the *actio praescriptis verbis:* Mackenzie, *Roman law*[5], p. 229.

[56] By the *condictio causa data causa non secuta:* see *Dig.* 12, 4, 5, pr.; §§ 1 and 2; *Dig.* 19, 4, 1, § 4; *Dig.* 19, 5, 7; *Code,* 4, 6, 10; *Code,* 4, 64, 4.

[57] 18b.

[58] Williams, *Inst. of Justinian*[2], p. 172.

[59] "Aut enim do tibi ut des, aut do ut facias, aut facias ut des, aut facio ut facias": *Dig.* 19, 5, 5, pt. But see Hunter's criticism as to the incompleteness of this statement, — *Roman law*[4], p. 540. Hunter gives many Roman law cases to illustrate Paulus' classification: *Id.* pp. 541–5.

[60] Treated supra §§ 754, 757.

and to letting and hiring[61]; and this innominate contract is best exemplified in exchange.[62] 2. "I give something to you in order that you may do something for me": this innominate contract *do ut facias* is analogous to hiring.[63] 3. "I do something for you in order that you may give something to me" (*facio ut des*). 4. "I do something for you in order that you may do something for me" (*facio ut facias*). The innominate contracts belonging to the last two just mentioned classes were enforceable, although not analogous to any other contracts having a name.

(1) Exchange (Permutatio)

Exchange defined. The Roman contract of exchange very closely resembles the contract of sale.[64] The Roman contract of "permutatio" or exchange has survived with its name in modern law, for instance the Italian and Spanish "permuta", and the Spanish-American "permutación".[65] Exchange is a contract familiar to many other systems of jurisprudence, including the Anglo-American.[66] § 761

(2) Minor Innominate Contracts

Compromise (transactio). The contract of compromise has already been considered; it is one of the modes of extinguishing an obligation.[67] § 762

[61] Treated supra § 758, infra §§ 780, 793.

[62] Treated infra § 761.

[63] Treated infra § 794.

[64] Treated infra § 780. For a long time the nature of exchange was disputed by the Roman jurists. Sabinus and Cassius (supra vol. i, §§ 103, 81) held that exchange was a species of sale, but Proculus (supra vol. i, § 102) held that it was a contract apart by itself and distinct from sale; and the view of Proculus finally prevailed in Roman law: *Inst.* 3, 23, 2. And modern law also holds the same as Proculus. The rights of either party to an exchange were enforceable, in Roman law, by the *actio praescriptis verbis:* see Colquhoun, *Roman law*, § 2176.

[65] *Civil code* of Italy, 1949; Spain, 1538; Argentina, 1519; Chile, 1897.

[66] Blackstone, *Comm.*, vol. ii, p. 446; *Civil code* of California, 1804; *Elwell* v. *Chamberlain*, 31 N. Y. 624. See infra vol. iii, § 1006, for foreign countries.

[67] See supra § 738.

§ 763 **Precarium.** The contract of precarium was a loan at will, of either movable or immovable property, redemandable at the pleasure of the owner or lender [68]; in other respects it resembles a commodatum.[69] A precarium was merely the permissive holding or occupying of something.[70]

§ 764 **Aestimatum.** The contract aestimatum arose when something valued at a certain price was received on condition that either it be returned or the valued price be paid. [71]

§ 765 **Donatio sub modo.** The contract known as donatio sub modo was a conditional gift made as follows: when a donor gave something to a donee on condition that he do something for the donor, if the donee failed to perform his obligation, he might be compelled by an action at law to reconvey the gift to the donor.[72]

[68] On precarium see *Dig.* 43, 26, frag. 15, § 2; frag. 4; frag. 1, pr.; frag. 12; *Bas.*, 58, 24; Hunter, *Roman law*[4], pp. 411–12; Colquhoun, *Roman law*, §§ 1562–3; Savigny, *Das Recht d. Besitzes*[7], §§ 25, 42; Girard, *Droit romain*[5], p. 597; Esmein, *Les baux perpétuels*, etc. (*Mélanges*, p. 393, Paris, 1886).

[69] Treated supra § 757.

[70] Hence, although an innominate contract (see Girard, *Id.*), it is sometimes treated (see Hunter, *Id.*) under the topic of personal servitudes (supra § 583).

[71] On aestimatum see *Dig.* 19, 3; *Code*, 4, 2; Girard, *Droit. romain*[5], p. 595 (*contrat innommé*).

[72] See *Code*, 8, 54 (55), 1; *Code*, 8, 53 (54), const. 9, const. 22, § 1; Girard, *Droit romain*[5], p. 596 (*contrat innommé*). As to gifts, see supra §§ 673–7.

CHAPTER III

VERBAL CONTRACTS

Verbal contracts defined and enumerated. Their survival in modern law. The Roman verbal contracts were made by words (*verbis*). The binding force of a verbal contract was the use of a set form of words, which ipso facto created an obligation.[1] A verbal contract was essentially an oral contract: and even if it was reduced to writing, such reduction merely furnished evidence as to the subject-matter of the contract.[2] § 766

There were four verbal contracts: stipulation, suretyship, the giving of a dowry, and services of a manumitted slave to his ex-master. The first two contracts were the most important: many of the principles of both stipulation and suretyship have descended into modern law, including the Anglo-American.[3]

1. STIPULATION (STIPULATIO)

Stipulation defined. The Roman stipulation was a contract made in the form of question and answer.[4] A promise thus made imported consideration — that is, had binding legal force without proof of any consideration having been given.[5] Anything could be the subject of a stipulation.[6] § 767

[1] Gaius, 3, 89 and 92; *Inst.* 3, 13, 2; *Inst.* 3, 15, 1.

[2] *Inst.* 3, 19, 17. A written memorandum recording the fact that a promise had been made in the form of a stipulatio was known, in the Justinian law, as a *cautio:* see Sohm (Ledlie [3]), *Roman law*, p. 382, note 2; p. 395, note 3; infra § 768. On the value of written evidence of stipulations, see Paulus, *Sent.* 5, 7, 2; *Dig.* 45, 1, frag. 30, frag. 134, § 2; *Code*, 8, 37 (38), 1 and 14; *Dig.* 2, 14, 7, § 11.

[3] See supra §§ 746, infra §§ 768–72.

[4] Gaius, 3, 92; *Inst.* 3, 15, pr.

[5] See supra § 750.

[6] In the Early Imperial Roman law there was a kind of stipulatio known as *adstipulatio:* Gaius, 3, 110–14, 117, 215, 216. The *adstipulator* (who must make the same stipulation as the stipulator himself) was added whenever a contract was made to become effective *after* the stipulator's

In Republican and Early Imperial law the formal Latin words in traditional use were such as the following.[7] *Dari spondes* (do you engage yourself to convey)? *Spondeo*[8] (I do). *Promittis* (do you promise)? *Promitto* (I do). *Fidepromittis* (do you pledge your credit)? *Fidepromitto* (I do). *Fidejubes* (do you become surety)? *Fidejubeo* (I do).[9] But these verbal formalities of stipulation were abolished late in the 5th century by the Emperor Leo, who permitted the parties to use any words uttered in any language understood by them.[10] And such was the law in the time of Justinian.[11] Stipulation lived as long as the Roman law by reason of its simple comprehensive form. Release of an obligation by stipulation has already been considered.[12]

2. SURETYSHIP (FIDEJUSSIO[13])

§ 768 **Nature and scope of suretyship.** In Roman law, by the contract of suretyship — usually annexed to a principal

death — if the adstipulator survived the stipulator, he could receive the performance due or sue on the contract. But in the Justinian law a contract could become operative after one's death (*Inst.* 3, 19, 13); consequently adstipulatio is not found in the law of Justinian.

[7] Gaius, 3, 92. These are repeated, with slight variation, in *Inst.* 3, 15, 1.

[8] The verbal formality "dari spondes? spondeo" was usable by Roman citizens only, for the words came from the *jus civile* (explained supra vol. 1, § 44): Gaius, 3, 93. For a case where this peculiar Roman contract could be used by a foreigner, see Gaius, 3, 94. All the other verbal formalities originated in the *jus gentium* (explained supra vol. i, § 44): Gaius, *Id.* Greek words equivalent to the Latin are given by Gaius, 3, 93; their use was optional, provided the parties understood the Greek language.

[9] The last two verbal formalities created the contract of suretyship (infra § 768).

[10] *Code*, 8, 37 (38), 10 (A.D. 472).

[11] *Inst.* 3, 15, 1. Two actions were available for the enforcement of a stipulation: *condictio*, in the case of a definite stipulation; *actio ex stipulatu*, in the case of an indefinite stipulation: *Inst.* 3, 15, pr.

[12] See supra § 735, particularly as to the *Aquilian stipulation.*

[13] There are other Roman terms for suretyship than *fidejussio.* **Intercessio** was of early origin, and was perhaps the most general: *Nov.* 4, 1; *Code*, 8, 40 (41), 19. **Sponsio** was the earliest form of suretyship, and was available to Roman citizens only (Gaius, 3, 93); **fidepromissio,** which was like sponsio, was employed by aliens or non-citizens (peregrini, — see Gaius, *Id.*, supra § 442). Finally sponsio and fidepromissio, both obso-

obligation[14] — a person bound himself and his heirs to meet (§ 768) the obligation of the principal debtor if he failed to meet it.[15] Suretyship is a well-known contract of modern law, including the Anglo-American.[16] And the Roman suretyship, "fidejussio", has given its name to the Italian suretyship, "fideiussione".[17]

Moreover it should be noticed that the Anglo-American "caution" of admiralty law, the Scotch law "caution" or "cautionry" and the French law "cautionnement" (all of

lete in the Justinian law, became merged into **fidejussio**: the obligation of this latest form of suretyship was the broadest. **Adpromissio**, the effect of which is to add a new debtor although the original debtor remains bound, was a form of suretyship. But *expromissio*, which substituted a new debtor for the original debtor, was a form of novation (supra § 739).

[14] "Omni obligationi fidejussor accedere potest": *Dig.* 46, 1, 1. To the same effect is Gaius, 3, 119a; *Inst.* 3, 20, pr.

[15] *Inst.* 3, 20, 2; *Dig.* 46, 1, 4, 1. In Roman law, **suretyship might be contracted in three ways**: by stipulation, by authorization (mandatum qualificatum), and by constituta pecunia. **1. Fidejussio, or suretyship formed by stipulatio.** The formal words of the question and answer were "fidejubes? fidejubeo": Gaius, 3, 92; *Inst.* 3, 15, 1 (supra § 767 for translation); see *Inst.* 3, 20, §§ 3, 7–8. In fidejussio the surety's heir also was bound: *Inst.* 3, 20, 2; *Gaius*, 3, 120. The remedy of the creditor against the surety was the *actio ex stipulatu*. **2. Mandatum qualificatum, or suretyship formed by the contract of agency** (see infra § 800). If one person authorized another person to lend money to a third person, the authorizing person became obligated to save the lender from all loss if the debtor failed to pay (see *Dig.* 17, 1, 12, § 13). The surety's heir also was bound: Hunter, *Roman law*[4], p. 576. The creditor's remedy against the surety was the *actio mandati*. **3. Constituta pecunia (also known as constitutum debiti alieni).** This was suretyship formed by an agreement (*pactum vestitum*, supra § 749, infra § 807) made by one person to pay the existing obligation of another at some future time named in the agreement, or to give security for its payment: see the account of Theophilus, 4, 6, 8–9; *Inst.* 4, 6, 8–9; *Dig.* 13, 5, 28; *Dig.* 13, 5, 21, 2. In constituta pecunia the surety's heir also was bound: *Code*, 4, 18, 1. The creditor's remedy against the surety was the *actio de pecunia constituta*, which resembled the *actio receptitia* (fused with the first-named action by Justinian).

[16] "The surety of English law corresponds very nearly to the *fidejussor*": Williams, *Inst. of Justinian*[2], p. 194. See also Robinson, *Elementary law*[2], § 170; infra vol. iii, § 1008.

[17] *Civil code*, 1899.

which signify surety, suretyship, or security[18]) derive their names from the Roman "cautio", which in the law of Justinian was a written memorandum drawn up to prove that a person had promised — in the form of a stipulation — to act as a surety.[19]

In both Roman and modern law the surety cannot be bound for a greater sum than that owed by the principal debtor, although he may be made liable for less.[20] In modern law, as in Roman, the obligations of a surety descend to his heirs.[21] In both Roman and modern law there may be a surety's surety — that is, a surety may have another person as surety.[22]

§ 769 **The SC. Velleianum and other Roman restrictions as to suretyship.** In the Imperial Roman law there were two important restrictions as to suretyship. 1. By a statute, the SC. Velleianum, enacted during the reign of Claudius no woman — married or single — could bind herself as a surety.[23] And not until several centuries later did this rigorous rule receive any exceptions.[24] But these never encroached upon the

[18] Black, *Law dictionary*[2], "caution", etc; Benedict, *Admiralty*[3], § 502; *Civil code* of France, 2011.

[19] The *cautio Muciana* (supra § 705, note) is a good illustration. Stipulatio is defined supra § 767.

[20] ROMAN LAW: Gaius, 3, 126; *Inst.* 3, 20, 5; *Dig.* 46, 1, 18. MODERN LAW: *Civil code* of France, 2013, Louisiana, 3037; Spain, 1826; Italy, 1900; Robinson, *El. law*[2], § 170.

[21] *Civil code* of France, 2013; Louisiana, 3044; Parsons, *Contracts*[8], vol. i, p. 30, note (e).

[22] ROMAN LAW: *Dig.* 46, 1, frag. 8, § 12; frag. 27, § 1; frag. 4, pr; Mackeldey (Dropsie), *Roman law*[14], § 454 (*fidejussio fidejussionis*). MODERN LAW: *Civil code* of France, 2014; Spain, 1823; Louisiana, 3038.

[23] *Dig.* 16, 1, frag. 2, §§ 1, 4–5; frag. 32, § 1; *Dig.* 6, 1, 40. This statute was enacted A. D. 46: Bruns, *Fontes juris*[6], p. 186. In the time of Augustus legislation had been enacted forbidding wives to act as surety for their husbands; but the new SC. Velleianum applied to every woman ("feminis omnibus"): *Dig.* 16, 1, 2, pr. and § 1. This was in harmony with the Roman policy of refusing to allow women to hold public office and to prevent them from incurring — so far as possible — business obligations: *Dig.* 16, 1, 1, § 1.

[24] When a creditor was deceived with the knowledge of the wife, she could not defend herself by the SC. Velleianum: *Code*, 4, 29, 5 (A. D. 224). Three hundred years later Justinian added a few more exceptions, not important: *Code*, 4, 29, const. 22–4 (A. D. 530–31).

long-standing, firmly established rule of the Imperial law that a woman could never act as a surety for her husband.[25]

2. In the Justinian law a person receiving a dowry did not have to give a surety for its restoration.[26]

Effects of suretyship between the creditor and the surety: benefit of discussion. § 770 The creditor must first sue the principal debtor[27]; and this Roman favor to the surety, subsequently known as the *beneficium discussionis* or *beneficium excussionis*,[28] is the lineal ancestor of the French "bénéfice de discussion", the Louisiana "benefit of discussion", the Italian "benefizio dell' escussione", and the Spanish "beneficio de excusión".[29]

Effects of suretyship between the principal debtor and the surety. § 771 When the principal debtor makes payment, the surety is at once released.[30] Whatever the surety has to pay he can recover from the principal debtor.[31] A surety

[25] *Nov.* 134, 8 (Justinian). This conformed to the general rule forbidding gifts between husband and wife during marriage: see supra §§ 476, 477.

[26] *Code*, 5, 20, const. 1 (A. D. 381); const. 2 (A. D. 530). Dowry is defined supra § 478.

[27] ROMAN LAW: *Nov.* 4, ch. 1. But if the principal debtor was absent (that is, out of the jurisdiction), or if the creditor was a banker, in both cases the creditor could first sue the surety: *Nov.* 4, 1; *Nov.* 136, 1. The older ante-Justinian rule was that in every case of suretyship the creditor could elect whether to first sue the principal or the surety: *Code*, 8, 40 (41), 5 and 19. MODERN LAW: *Civil code* of France, 2021–2; Germany, 771; Italy, 1907–8; Spain, 1830–32; Louisiana, 3045. But sometimes it is provided in the Modern Codes (as in Louisiana) that the surety cannot obtain discussion unless he demand that the creditor first sue the principal. In English law the creditor, unless forbidden by the contract, may always elect to first sue the surety (Williams, *Inst. of Justinian*[2], p. 195); and this rule is reminiscent of the ante-Justinian Roman rule.

[28] It is also sometimes referred to as *beneficium ordinis:* Mackeldey (Dropsie), *Roman law*[14], § 453. All these terms — discussio and excussio are rare Latin words used in Roman times — were put into use by the medieval Civilians (see especially vol. i, §§ 210, 216).

[29] *Civil code* of France, 2013; Louisiana, 3051; Italy, 1907; Spain, 1830, 1836.

[30] ROMAN LAW: *Dig.* 46, 1, frag. 60; frag. 68, 2; Paulus, *Sent.*, 2, 17, 5. MODERN LAW: Williams, *Inst. of Justinian illustrated by English law*[2], p. 239.

[31] ROMAN LAW: But the creditor must first assign to the surety his right of action against the debtor and the co-sureties: *Dig.* 46, 1, frag. 17; frag. 41, § 1; frag. 36 and 39; *Code*, 8, 40 (41), const. 2 and 11. This provision

may avail himself of all defenses belonging to the principal debtor.[32]

§ 772 **Effects of suretyship between the sureties: contribution.** If there are several sureties, each is liable for the entire debt.[33] But if one surety paid the debt, he can hold his co-sureties for contribution to make up the excess over his share.[34]

3. MINOR VERBAL CONTRACTS

§ 773 **Promise of a dowry (dictio dotis).** In Roman law it was possible to promise a dowry by stipulation.[35] But this was not the only way to do so.[36]

§ 774 **Promise of services by a manumitted slave to his ex-master (liberti operae libertatis causa impositae).** As part of the price of freedom, it was customary to make a slave swear before he was set free that as soon as he was manumitted he would promise by stipulation to render services to his ex-master: upon his manumission a freedman thus stipulating became legally bound to perform work for his former master.[37]

which originated in the praetorian law (supra vol. i, § 41) was called by the Commentators (supra vol. i, § 216) **beneficium cedendarum actionum.** MODERN LAW: *Civil code* of Spain, 1838; Louisiana, 3052; France, 2028.

[32] ROMAN LAW: *Inst.* 4, 14, 4. MODERN LAW: *Civil code* of Germany, 768; France, 2036; Louisiana, 3029.

[33] ROMAN LAW: "Singuli in solidum tenentur," — *Inst.* 3, 20, 4; Gaius, 3, 120. But a surety who was sued had the right to compel the creditor to sue the co-sureties for their respective shares: Gaius, 3, 122; *Inst.* 3, 20, 4. This favor, known as the **beneficium divisionis,** was introduced by the Emperor Hadrian: Gaius, *Id.* And it was applicable to any surety, whether the suretyship originated by fidejussio, mandatum, or constituta pecunia: *Code,* 4, 18, 3. MODERN LAW: *Civil code* of France, 2025–6; Louisiana, 3049; Spain, 1837; Germany, 769. And the Roman doctrine of *beneficium divisionis* is repeated, for instance in the Louisiana code.

[34] ROMAN LAW: Gaius, 3, 122; *Inst.* 3, 20, 4. MODERN LAW: *Civil code* of Spain, 1844: France, 2033; Louisiana, 3058.

[35] Defined supra § 767. Dowry is treated supra § 478.

[36] "Dos datur, vel *dicitur,* vel promittitur": Ulpian, *Reg.* 6, 2. See *Cod. Theodos.* 3, 13, 3; supra § 749, note; Hunter, *Roman law*[4], p. 466.

[37] On this subject see *Dig.* 40, 12, 44, pr.; *Dig.* 38, 1, 7, pr.; *Dig.* 40, 4, 36; Hunter, *Roman law*[4], pp. 668–9; Thélchan, *De la stipulatio operarum* (in *Études de l'hist. jurid. off. à P. F. Girard,* vol. i, p. 355, Paris, 1913). As to slavery, etc., see supra §§ 434, 436.

CHAPTER IV

LITERAL CONTRACTS

Literal contracts defined. A Roman literal contract was one made by writing (*litteris*) in the following peculiar sense: it was based on a written record, which was not only the evidence of the contract but also the foundation and binding force of the contract itself irrespective of the presence of any consideration.[1] Literal contracts arose at an early date and flourished during the Republic; but, although still a recognized part of the Early Imperial law in the 2d century A.D.,[2] they subsequently fell gradually into disuse,[3] and four centuries later in the time of Justinian literal contracts no longer existed.[4] § 775

It is quite curious that Lord Coke, who possessed no love for Roman law,[5] should have identified the English Common Law deed with the Roman litterarum obligatio.[6] And perhaps the Roman classification, adopted in practice, of contracts into formal and formless (to the former of which belonged a literal contract) may have suggested the English distinction between contracts under seal as to which the consideration is presumed, and contracts in writing but not under seal as to which an actual consideration must be proved.[7]

[1] See Gaius, 3, 128–34; *Inst.* 3, 21; Theophilus 3, 21, pr.; Hunter, *Roman law*[4], pp. 466–71. As to consideration, see supra § 750.

[2] Our most complete account of them comes from Gaius, 3, 128–34.

[3] Petit, *Droit romain*[7], § 341.

[4] *Inst.* 3, 21, pr. This is disputed however by Petit, *Id.* § 344, who holds that there was one literal contract in the Justinian law not mentioned in his Institutes: see infra § 778.

[5] See supra vol. i, §§ 387, 389.

[6] *Coke upon Littleton*, 171, b. He probably followed Bracton, 99b, (supra vol. i, § 374) who seems to have referred to a deed when he mentions *stipulatio per scripturam*.

[7] See Williams, *Inst. of Justinian*[2], p. 198; Robinson, *El. law*[2], § 160.

1. EXPENSILATIO OR NOMINA TRANSCRIPTICIA

§776 **Nature of expensilatio or nomina transcripticia.** The formal contract of expensilatio grew out of the Roman practice of bookkeeping.[8] The Roman books of account included a daybook or memorandum-book of an informal temporary nature, called *adversaria*, in which daily transactions were recorded. At the end of every month these entries (*nomina*) were transcribed — posted — in a formal, permanent ledger, called *tabulae* or *codex accepti et expensi*.[9] When a creditor, with the consent of his debtor, made an entry[10] in his ledger[11] charging the debtor as owing a certain sum of money, the formal contract of expensilatio was concluded[12] and gave the creditor a right to sue the debtor if necessary.[13] This literal contract could be extinguished only by another formal entry wiping out the debt.[14]

Only Roman citizens could employ all the varieties of expensilatio.[15] Although expensilatio is still found in the law

[8] For exhaustive treatment of the literal contracts and Roman bookkeeping see Roby, *Roman private law*, vol. ii, pp. 279–96; Muirhead, *Roman law*[2], p. 258.

[9] Cicero, *Pro Roscio*, 3, 8. Quite in harmony with the traditional early Republican simplicity is Dionysius' statement that once in five years the Romans had to appear before the censors and swear that their books were honestly and accurately kept.

[10] Theophilus (3, 21, pr.) gives this entry as follows: "centum aureos, quos mihi ex causa locationis debes expensos tibi tuli? Expensos mihi tulisti." (Ferrini's Latin translation is translated into English by Poste, *Gaius*[4], p. 363.)

[11] It is uncertain whether an entry made in the daybook (*adversaria*) was binding prior to its transference to the *codex*; Poste, *Gaius*[4], p. 362, holds that it would support an action, — such is his inference from Cicero, *Pro Roscio*, 5.

[12] Although the debtor in his own book made a corresponding entry indicating his assent, which was evidence — but not the only evidence — admissible to prove his assent to the creditor's entry, the expensilatio was probably complete without the debtor's entry: Poste, *Gaius*[4], p. 363.

[13] The creditor's remedy was the *condictio certi*.

[14] Such as *acceptum ferre*. See supra §735; Hunter, *Roman law*[4], p. 641.

[15] Gaius, 3, 133.

of the Early Empire,[16] it had fallen into disuse commonly.[17] And long before Justinian's time it ceased to exist,[18] being supplanted by Greek forms of commercial engagements and the invention of the praetorian pact of *constitutum debiti*.[19]

2. CHIROGRAPHUM AND SYNGRAPHA

Chirographum and syngrapha defined. In Cicero's time there were two contracts of Greek origin which had commonly superseded expensilatio: these were chirographum and syngrapha.[20] These appear to be synonymous, and mean a written acknowledgment or promise to pay a debt.[21] They were employed in transactions where both parties were not Roman citizens.[22] Both chirographum and syngrapha are still found in the Early Imperial law.[23] § 777

[16] Gaius, 3, 128. Compare Gaius, 3, 89 with *Dig.* 44, 7, 1, § 1 (Gaius): in this latter citation Gaius does not mention *literal* contracts.

[17] The use of the ledger (*codex*) lingered the longest among bankers and money-lenders: see *Dig.* 2, 14, 9; *Dig.* 4, 8, 34; Petit, *Droit romain*[7], § 341. The disuse of the *codex* was common in the time of Cicero: Hunter, *Roman law*[4], p. 468.

[18] *Inst.* 3, 21; Petit, *Droit romain*[7], §§ 344, 343.

[19] Roby, *Roman private law*, vol. ii, p. 288; infra § 777. As to *constitutum debiti*, see *Dig.* 13, 5, 28; *Inst.* 4, 6, 9; *Dig.* 2, 14, 47, § 1. The *constitutum debiti proprii* was a *pactum vestitutum* (explained supra § 749; it was a minor consensual contract, infra § 807).

[20] Hunter, *Roman law*[4], p. 469. But some authorities do not regard these contracts as literal contracts: see the discussion of this point in Petit, *Droit romain*[7], §§ 343, 344, who holds the better view that they are literal contracts. Syngrapha can be traced as early as the Second Punic War (210 B. C.). Expensilatio is treated supra § 776.

[21] Poste, *Gaius*[4], p. 365; Sohm (Ledlie[3]), *Roman law*, p. 395, note 3. The chirographum was signed by the debtor; and it is called a "promissory note" by Roby, *Roman private law*, vol. ii, p. 288. The syngrapha was probably signed by both creditor and debtor.

[22] Gaius, 3, 134. See supra §§ 442–3.

[23] Gaius, 3, 134.

§778 **Cautio.** The Later Imperial and Justinianean acknowledgment of a loan, known as *cautio*, was the direct descendant of the chirographum.[24] But whether cautio should be regarded as a contract is disputed.[25]

[24] Hunter, *Roman law* [4], p. 471; Petit, *Droit romain* [7], § 344. Cautio is treated in *Inst.* 3, 21; *Code*, 4, 30, const. 1 and 3. If a borrower had given a cautio but had never actually received any money from the lender, he could defend himself against a suit for payment by pleading the **exceptio non numeratae pecuniae:** see *Inst.* 4, 13, 2; *Inst.* 4, 6, 33c; *Code*, 4, 30, const. 7 and 14, pr.; *Nov.* 18, 8.

[25] That cautio is not a literal contract, see Hunter, *Roman law* [4], p. 470; that it is, see Petit, *Droit romain* [7], § 344. Petit holds that the language of Justinian's Institutes (3, 21) "quae nomina hodie non sunt in usu" refers only to expensilatio (supra § 776), and does not imply that there was no other literal contract in existence. And Petit argues from *Cod. Theod.* 2, 4, 6 (A. D. 406) that in the 5th century a literal obligation could arise from cautio: "in litterarum obligationem facta *cautione* translatum est."

CHAPTER V

CONSENSUAL CONTRACTS

Consensual contracts defined. Their survival in modern law. The Roman consensual contracts were made merely by a manifestation of the consent (*consensus*) of the parties.[1] Consensual contracts required no formality of words or of writing: their binding force was consent.[2] The principal consensual contracts were sale, letting and hiring, partnership, and agency. These contracts, the most important of all the Roman contracts, have descended into the law of every modern civilized country, including Great Britain and the United States. In both Roman and modern law the making of a consensual contract does not necessitate the presence of the contracting parties: they may make a contract by letter or messenger or by employing some other recognized means of communication.[3] § 779

1. PURCHASE AND SALE (EMPTIO ET VENDITIO)

Sale defined. In both Roman and modern law, sale is a contract in which one of the parties agrees to deliver something to the other, who on his part agrees to pay[4] therefor a sum of § 780

[1] Gaius, 3, 89, 136; *Inst.* 3, 13, 2; *Inst.* 3, 22, 1.

[2] Gaius, 3, 136; *Inst.* 3, 22, 1. See supra § 749.

[3] ROMAN LAW: Gaius, 3, 136; *Dig.* 18, 1, 1, 2; *Inst.* 3, 22, 2. See *Inst.* 3, 19, 12. MODERN LAW: Benjamin, *Principles of contract*[3], pp. 15–16.

[4] The seller could, in Roman law, enforce his rights against the buyer by the *actio venditi:* see *Dig.* 18, 1, 75; *Dig.* 19, 1, 11, 1. The buyer had the following actions to enforce the duties of the seller. 1. *Actio empti:* this was especially available to enforce all the terms of the sale (see *Dig.* 19, 1, 13, 8; *Dig.* 19, 1, 11, 1). 2. *Actio ex stipulatu* or *condictio certi:* this could be employed to enforce a promise made by stipulation (supra § 767). 3. *Actio quanti minoris* or *actio aestimatoria:* this could be employed to reduce the price, provided it was brought within one year from the sale (see *Dig.* 21, 1, frag. 43, § 6; frag. 19, § 6; frag. 38, pr.; frag. 55). 4. *Actio redhibitoria:* this was available to cancel a sale because of faults in

money. The person promising to deliver a thing[5] is known as the seller or vendor[6]; the person promising to pay the sum of money is known as the buyer or purchaser or vendee[7]; the sum of money is known as the price.[8] The name itself of the Roman "venditio" or sale has survived in the Italian "vendita", the Spanish "venta" and the French "vente".

The thing sold must be in commerce.[9] In Roman law the sale of something not belonging to the vendor was valid.[10] Modern law is divided on this question: for instance the laws of Spain, Chile, and Japan are like the Roman[11]; but the laws of France, Italy, and Argentina are contrary to the Roman, and hold that the sale of something not belonging to the vendor
§ 781 is voidable — that is, may be inoperative.[12]

Form of the contract of sale. In the Roman law of Justinian it was not necessary that a contract of sale be in writing.[13]

the thing sold, provided it was brought within six months from the sale: see *Dig.* 21, 1, frag. 23, § 7; frag. 19, § 6; frag. 38, pr.; frag. 55; frag. 60; *Code*, 4, 58, 2; Mackeldey (Dropsie), *Roman law* [14], § 403; Hunter, *Roman law* [4], p. 505; infra § 790.

[5] "Merx" (something sold) is the Roman technical word.

[6] "Venditor" is the word used in Roman law to designate the seller.

[7] "Emptor" is the Roman word.

[8] "Pretium" is the Roman word.

[9] *Dig.* 18, 1, 34, § 1; supra § 561. For exceptions, see *Inst.* 3, 23, 5; *Dig.* 18, 1, frag. 4, 5, and 70. The Emperors imposed **taxes on sales**, the most important of which was the *centesima rerum venalium* (1%) originating with Augustus and continuing for a long time during the Early Empire; see Tacitus, *Ann.* i, 78; Williams, *Inst. of Justinian* [2], p. 206.

[10] *Dig.* 18, 1, 28. See Mackeldey (Dropsie), *Roman law* [14], § 403, subsection 4; *Dig.* 21, 2, 19; *Dig.* 18, 1, 34, § 1; *Code*, 8, 44 (45), 25; *Code*, 4, 52, 5.

[11] Levé, *Code civil espagnol trad.*, p. xxxiii, arguing from *Civil code* of Spain, 861; *Civil code* of Chile, 1815; Prudhomme, *Code civil chilien trad.*, p. liii; *Civil code* of Japan, 560–63; see infra § 782.

[12] The consensus of French opinion as to the meaning of art. 1599 of the French Civil Code ("la vente de la chose d'autrui est nulle") is that "nulle" means, not void, but *voidable* — that is, may be either avoided or confirmed by ratification: Sirey, *Code Civil annoté*, 4th ed. vol. iii, p. 234, art. 1599. See also civil code of Italy, 1459; Argentina, 1363; and infra § 782.

[13] *Dig.* 44, 7, 38; *Inst.* 3, 23, pr. As to the making of *written* contracts of sale, see *Inst.* 3, 23, pr.; *Code*, 4, 21, 17: *Dig.* 18, 1, 1, 2; *Dig.* 44, 7, 2; *Code*, 4, 48, 4.

But in Anglo-American law certain contracts of sale must be in writing.[14] In both Roman and modern law a sale may be made conditionally as well as unconditionally.[15]

Earnest (arra). In Roman law a contract of sale could be § 782
proved also by the giving of earnest (arra) from the buyer to the seller — that is, by the delivery of something mutually agreed upon to bind the bargain.[16] And modern law is the same.[17] The name itself of the Roman "arra" or earnest has survived in the Spanish "arras", the French "arrhes", and the Italian "arra" or "caparra". In Roman law if the agreement of sale was followed by the giving of earnest, the contract might be rescinded by the buyer forfeiting the earnest paid, or by the seller returning double the earnest received[18]; and this Roman rule is still the law of some countries, for instance Austria, France, Italy, Spain, Louisiana, Chile, and Japan.[19] Modern German law is the same as the Roman, with the following exception: in German law the seller has to return merely the earnest and not twice as much.[20] Entirely different from Roman law is the Anglo-American, which regards earnest as part payment of the purchase price and

[14] See Williams, *Inst. of Justinian* [2], p. 208; Benjamin, *Principles of contract* [3], pp. 32–50. This requirement of written evidence is due to an old English statute commonly known as the *Statute of Frauds*, 29 Charles II, c. 3 (1677), which is still in force, in more or less modified form, in nearly all the United States.

[15] ROMAN LAW: *Inst.* 3, 23, 4. MODERN LAW: Benjamin, *Sales* [6], pp. 255 et seq.; Williams, *Inst. of Justinian* [2], p. 211; *Civil code* of France, 1584; Louisiana, 2457.

[16] Gaius, 3, 139; *Inst.* 3, 23, pr.; *Code*, 4, 21, 17, §§ 1–2. See *Dig.* 18, 1, 35, pr. The arra might be money; frequently it consisted of a ring: *Dig.* 14, 3, 5, 15. When the sale was completed, the earnest (unless made part of the price itself) must be returned to the buyer: *Dig.* 19, 1, 11, 6; *Dig.* 18, 3, 8.

[17] *Civil code* of France, 1590; Germany, 336–8; Italy, 1217, 1230; Spain, 1454; Louisiana, 2463; Williams, *Inst. of Justinian* [2], pp. 206–8; Benjamin, *Sales* [6], pp. 164–8; Kent, *Comm.*, vol. ii, p. 495, note.

[18] *Inst.* 3, 23, pr.; *Code*, 4, 21, 17, § 2. But the rescission should take place before performance of the contract began.

[19] *Civil code* of Austria, 910; France, 1590; Italy, 1217; Spain, 1454; Porto Rico, 1357; Louisiana, 2463; Chile, 1803; Japan, 557.

[20] *Civil code* of Germany, 337–8.

consequently does not allow either of the contracting parties to rescind the sale.[21]

§ 783 **Completion of the making of a contract of sale.** In both Roman and modern law the contract of sale is completed or perfected just as soon as the price is settled.[22] But as to things which it is customary to taste before a sale of them, both Roman and modern law hold that a sale of them is not perfected until the buyer has tasted them and found them satisfactory.[23]

§ 784 **The price.** In both Roman law and in many modern legal systems the price must be certain or definitely fixed.[24] But in England and the United States, if no price is actually agreed upon, the law implies a reasonable price or payment for a thing at what it is reasonably worth.[25] In both Roman and modern law the price must be in money or in something representing money.[26] But although the determination of the price must never be left to the judgment of one of the contracting parties,[27] the price may be fixed by a third person not a party to the contract.[28]

[21] Blackstone, *Comm.* vol. ii, p. 447–8; Parsons, *Contracts* [8], vol. ii, p. 56.

[22] ROMAN LAW: Gaius, 3, 139; *Inst.* 3, 23, pr.; *Dig.* 18, 6, 8, pr. MODERN LAW: *Civil code* of France, 1583; Louisiana, 2456; Italy, 1448; Spain, 1450; Porto Rico, 1353; Chile, 1801. But modern law may require also that the contract of sale be in writing: see supra § 781.

[23] ROMAN LAW: *Dig.* 18, 1, 34, 5; *Dig.* 18, 6, 4, pr. and § 1. MODERN LAW: *Civil code* of France, 1587; Italy, 1452; Spain, 1453; Chile, 1823.

[24] ROMAN LAW: Gaius, 3, 140; *Inst.* 3, 23, 1. The transaction must be really a sale: see *Dig.* 50, 17, 16 (on "imaginaria venditio"). MODERN LAW: *Civil code* of France, 1591; Italy, 1454; Louisiana, 2464; Spain, 1445; Chile, 1808; Argentina, 1349; Benjamin, *Sales* [6], p. 89.

[25] Benjamin, *Sales* [6], pp. 87, 90, 204; Williams, *Inst. of Justinian* [2], p. 209. Such a transaction would probably have been regarded in Roman law as an innominate contract (defined supra § 760).

[26] ROMAN LAW: Gaius, 3, 141; *Inst.* 3, 23, 2; *Dig.* 19, 4, 1, pr.; *Dig.* 18, 1, 7, 1. MODERN LAW: *Civil code* of Spain, 1445; Louisiana, 2439; Benjamin, *Sales* [6], pp. 2, 89. But where the price consists of something other than money, the transaction is an exchange (supra § 761) and not a sale: Gaius, 3, 141; *Inst.* 3, 23, 2; *Civil code* of Spain, 1446, 1538; France, 1702; Louisiana, 2660; Germany, 473.

[27] ROMAN LAW: *Dig.* 18, 1, 35, 1. MODERN LAW: *Civil code* of Spain, 1449; Chile, 1809.

[28] ROMAN LAW: Gaius, 3, 140; *Inst.* 3, 23, 1; *Code*, 4, 38, 15. MODERN LAW: *Civil code* of France, 1592; Austria, 1056; Italy, 1454; Spain, 1447;

Rescission of a sale for lesion or undervalue. In Roman law the seller could rescind[29] a sale when the thing was sold for less than half its actual value, unless the buyer agreed to pay the deficiency in price.[30] This Roman rule has descended into the modern law of some countries, for instance France, Italy, and Louisiana.[31] The undervalue or damage suffered by the seller was known in Roman law as "laesio"[32]; and it has given its name to the Louisiana "lesion", the French "lésion", the Italian "lesione" and the Spanish "lesión".[33] § 785

Effects of a sale: (1) as to the ownership of the thing sold. In Roman law the ownership of the thing sold was not transferred until delivery and after payment of the price.[34] The effect of a sale, in Roman law, was merely to bind the seller to transfer the ownership.[35] In other words, the purchaser § 786

Louisiana, 2464; Benjamin, *Sales*[6], pp. 88, 90; Williams, *Inst. of Justinian*[2], p. 210; Parsons, *Contracts*[8], vol. i, p. 544.

[29] Rescission of obligations is treated supra § 736. A contract of sale could be rescinded not only by the *mutual* agreement of the contracting parties prior to the fulfillment of the contract (*Inst.* 3, 29, 4; *Dig.* 18, 5, 3 and 5; *Dig.* 50, 17, 35; see *Code*, 4, 45; *Dig.* 18, 1, 6, § 2), but also by *either* party when — in pursuance of such a right reserved by him at the time of making a contract — a party withdrew from the contract (*Dig.* 18, 1, 3; *Dig.* 18, 5; *Code*, 4, 58, 4).

[30] *Code*, 4, 44, 2 and 8. See Mackenzie, *Roman law*[7], p. 236; Sohm (Ledlie[3]), *Roman law*, p. 403. Mackeldey holds that these Roman provisions are applicable to the buyer as well as to the seller: *Roman law*[14] (Dropsie), § 406, note 4. Rescission by the buyer because of the discovery of latent defects (unknown to the seller) in the thing sold is treated infra § 790.

[31] *Civil code* of France, 1658, 1674 et seq.; Italy, 1529 et seq.; Louisiana, 2566, 2589 et seq. Spanish law allows rescission by the vendee also (compare previous footnote): *Civil code*, 1469, 1470.

[32] More specifically, *laesio ultra dimidium* or *laesio enormis*. The word "laesio" might connote injury or damage suffered by a person other than a vendor: see supra § 736.

[33] The Porto Rican English version of the Spanish code uses the English term "lesion": *Civil code*, 1258.

[34] *Inst.* 2, 1, 41; *Dig.* 19, 1, 11, § 2; *Dig.* 18, 1, frag. 19 and 53; *Dig.* 14, 4, 5, § 18, But if the sale was on credit, the title to the thing sold passed when the property was delivered.

[35] As to the necessity of delivery to transfer ownership, see supra § 642; *Code*, 2, 3, 20.

(§ 786) obtained title to the thing sold, not because of the sale, but because of the delivery made as a result of the sale.

Modern law is divided as to the effect of a sale on the ownership of the thing sold. Some countries adhere to the Roman rule making the transfer of ownership in the thing sold to take effect only upon its delivery; this is the law of Austria, Germany, Spain, and Chile[36]: for instance the Austrian Civil Code provides that "the acquisition (of property) only takes place upon the delivery of the article sold. Till the moment of delivery the seller retains the right of property."[37]

But there are other modern countries which do not adopt the Roman rule, and hold that the title to the property passes by virtue of the contract of sale, without delivery or payment: this rule, so contrary to the Roman, is the law of Great Britain, the United States, France, and Italy.[38]

[36] *Civil code* of Austria, 1053; Schuster, *German civil law*, p. 209; Lorenzen, *Validity of wills, deeds, contracts*, etc. 20 Yale Law Journal, p. 450, note 189; De la Grasserie, *Code civil allemand trad.*, Introduction, p. lii, and art. 446, note 2; Levé, *Code civil espagnol trad.*, p. xxxiv; *Civil code* of Spain, 609, 1095, 1462–4; Prudhomme, *Code civil chilien trad.*, pp. lii–liii; *Civil code* of Chile, 1801. When the document transferring an immovable is recorded in a public registry, this operates as delivery to transfer the title. The Roman rule requiring delivery to transfer the ownership of the thing sold was law also in France prior to the adoption of the present Civil Code, and in Scotland prior to the Sale of Goods Act of 1893 which assimilated this rule of Scotch law to English law: Benjamin, *Sales* [6], pp. 360, 362; Williams, *Inst. of Justinian* [2], p. 74; Mackenzie, *Roman law* [7], p. 240, note 3.

[37] Art. 1053 (Winiwarter).

[38] *Sale of Goods Act* 1893, 56 and 57 Victoria, § 1 (3); Uniform Sales Act, United States, § 1 (2); Williams, *Inst. of Justinian* [2], p. 74; Mackenzie, *Roman law* [7], p. 240, note 3; Benjamin, *Sales* [6], p. 362; Parsons, *Contracts* [8], vol. i, p. 545; *Civil code* of Louisiana, 2456, 870; France, 1583; 1599, 1138, 711; Italy, 1448, 710. But there are modes employed in Anglo-American law to preserve the title in the seller: such as **consignment with a bill of lading in favor of the seller** or his agents, and **"C.O.D." sales** (see Benjamin, *Sales* [6], book ii, ch. 6); furthermore there is **stoppage in transitu** (that right of the seller arising from the insolvency of the buyer, which is universally recognized in modern law, Benjamin, *Sales* [6], pp. 808–65), — this may be said to have a Roman root found in *Inst.* 2, 1, 41 (which provides that title to the thing sold did not pass to the buyer, even after delivery, until he had either paid for it or given security for the price).

Effects of a sale: (2) as to the risk of the thing sold. In Roman law as soon as the contract of sale was perfected,[39] both the advantages and the risk of the thing sold immediately passed to the buyer, unless it was otherwise agreed.[40] But although the buyer had to take the risk of loss before delivery, yet this was on condition that the seller take the greatest care of the thing sold until its delivery — the seller being liable to the buyer for any negligence.[41] § 787

Modern law is divided as to the effect of a sale on the advantages and risk of the thing sold. The Roman rule that these belong to the buyer is the law, for instance of Great Britain, the United States, France, and Italy.[42] But in the law of Germany the contrary rule is followed: namely that prior to delivery of the thing sold the advantages and risk belong to the seller.[43]

Obligations of the seller: (1) delivery. In the absence of special agreement, the obligations of the seller arising from the contract of sale were, in Roman law, as follows: delivery, warranty of the buyer's peaceful possession, and warranty of quality as to the thing sold. § 788

The seller was bound to deliver to the purchaser, at the time and place agreed, the thing sold with all its advantages accruing since the making of the contract of sale.[44] Until

[39] See supra § 783.

[40] "Post perfectam venditionem omne commodum et incommodum, quod rei venditae contingit, ad emptorem pertinet": *Code*, 4, 48, 1. "Periculum rei venditae statim ad emptorem pertinet, tametsi ad huc ea res emptori tradita non sit": *Inst.* 3, 23, 3. See also *Dig.* 47, 2, 14, pr.; *Dig.* 18, 1, 35, 4; *Dig.* 18, 6, 8, pr. The theory of the Roman law was that delivery and payment of the price "had a retroactive effect, so as to make the buyer practically owner from the time of the sale" (Williams, *Id.* p. 210); in other words the buyer's right *in rem* became dated back to the time of making the contract of sale.

[41] *Dig.* 18, 6, 3; *Dig.* 18, 1, 35, 4; *Dig.* 19, 1, 36; *Hunter, Roman law* [4], p. 494; see supra § 732 as to negligence or want of care.

[42] Williams, *Inst. of Justinian* [2], pp. 210–11; Benjamin, *Sales* [6], p. 358; Buckland, *El. Roman law*, § 121; *Civil code* of Louisiana, 2467; France, 1614; Italy, 1470.

[43] *Civil code* of Germany, 446, 447, 323; Schuster, *German civil law*, p. 215; Sohm (Ledlie [3]), *Roman law*, p. 402.

[44] "Et in primis rem praestare . . . id est tradere": *Dig.* 19, 1, 11, 2. That the advantages accruing since the sale should go to the buyer, see

delivery, the seller was liable to the buyer for failure to take good care of the thing sold.[45] Modern law also recognizes the seller's obligation to deliver.[46]

§ 789 **Obligations of the seller: (2) implied warranty of the buyer's quiet enjoyment or peaceful possession of the thing sold — sometimes called warranty against the buyer's eviction.** Although in Roman law the seller did not have to directly warrant his title as owner — in other words there was no warranty of title,[47] yet if a third person dispossessed the buyer from the thing sold, the seller was bound to compensate him for it.[48] This interruption of the buyer's possession was called *evictio*.[49]

This Roman warranty of the buyer's peaceful possession is law to-day in some countries, for instance France, Italy, Spain, Argentina, Chile, and Louisiana.[50] And the Roman name of this warranty — "evictio" — has survived in the Louisiana "eviction", the French "éviction", the Spanish "evicción", and the Italian "evizione".[51]

English law, as to the sale of real property (immovables), seems to resemble the Roman, for in English law a direct warranty of title as to realty does not exist.[52] But as to the

Code, 4, 48, 1; *Inst.* 3, 23, 3. On the subject of delivery in a sale, see Hunter, *Roman law*[4], pp. 492–4; supra §§ 642–3.

[45] The seller was liable for ordinary negligence or the absence of ordinary care: *Dig.* 18, 1, 35, 4; *Dig.* 19, 1, 36. See also supra §§ 787, 732; Hunter, *Roman law*[4], p. 494.

[46] See for instance *Civil code* of France, 1603; Louisiana, 2475; Italy, 1462; Spain, 1461; Benjamin, *Sales*[6], pp. 651, 672 (Anglo-American law).

[47] Sohm (Ledlie[3]), *Roman law*, p. 399; Williams, *Inst. of Justinian*[2], p. 199.

[48] *Dig.* 21, 2; *Code*, 8, 44 (45); *Dig.* 19, 1, 30, 1; *Dig.* 41, 3, 23, 1; *Code*, 4, 52, 5; *Code*, 8, 44 (45), 6. The technical phrase was *rem habere licere* (to have undisturbed possession). In other words, the seller had to *evictionem praestare*. On the subject of eviction, see Hunter, *Roman law*[4], pp. 495–8.

[49] For instance "de evictionibus" is part of the title of *Dig.* 21, 2.

[50] *Civil code* of France, 1625; Italy, 1481; Spain, 1474; Chile, 1837; Porto Rico, 1377; Argentina, 1448; Louisiana, 2476; Wright, *French Civil Code*, p. 308, note (b).

[51] *Civil code* of Louisiana, 2500; France, 1626; Spain, 1475; Italy, 1482.

[52] Williams, *Inst. of Justinian*[2], p. 200. The buyer should carefully examine the seller's title; furthermore the buyer is protected by the

sale of personal property or chattels (movables), English law is different from the Roman: in English law the seller must directly warrant his title as owner.[53] German law also is different from the Roman: in German law there is in *all* cases a direct warranty of title by the seller.[54]

Obligations of the seller: (3) implied warranty of quality as to the thing sold. Redhibition and the redhibitory action, or the buyer's rescission of a sale for latent defects subsequently discovered. In Roman law the seller warranted the thing sold, whether movable or immovable, to be free from latent defects or secret faults.[55] If the buyer subsequently discovered in the thing sold a latent defect or vice, unknown to the seller,[56] which renders it useless or unsuited to its purpose or diminished in value, he could elect either to sue for the annulment of the sale or to sue for a reduction of the price.[57] § 790

This Roman implied warranty of quality exists to-day in all the principal systems of modern law, except the English: it is found for instance in the law of Austria, France, Germany,

covenants for title in a deed (see Hopkins, *Real property*, p. 440), which take the place of a warranty.

[53] Benjamin, *Sales* [5], p. 591.

[54] *Civil code* of Germany, 434–8; Schuster, *German civil law*, pp. 211–13; Sohm (Ledlie [3]), *Roman law*, p. 399.

[55] This warranty binding the seller without special agreement was a provision of the Edict of the Aedile (see supra vol. i, §§ 41, 61), a police magistrate who had jurisdiction over markets and became interested in the law of sale. Aedilician actions to enforce warranty of quality were thoroughly established by the last century B.C.: Cicero, *De officiis*, iii, 16–17. As to the Aedilician Edict and its provisions, see *Dig.* 21, 1; *Code*, 4, 58. Originally applicable to the sale of slaves and beasts of burden, the provisions of the Edict were extended early in the first century A.D, to sales of every kind of property, movable and immovable: *Dig.* 21, 1, 1, pr. (the jurist Labeo, supra vol. i, § 90); *Dig.* 21, 1, 63; *Dig.* 21, 1, 49; *Code*, 4, 58, 4. See also supra § 563. On this subject of warranty of quality, see Hunter, *Roman law* [4], pp. 498–502, 534; *Dig.* 19, 1, 13, § 1; *Code*, 4, 49, 14.

[56] If the seller was aware of any latent defect and concealed it, he was liable for fraud (dolus): *Dig.* 19, 1, 13, pr.

[57] *Dig.* 21, 1, 18, pr.; *Dig.* 44, 2, 25, § 1. See *Dig.* 21, 1, frag. 1, §§ 6 and 8; frag. 19, § 1.

(§ 790) Italy, Spain, Argentina, Chile, Quebec, and Louisiana.[58] But in the law of Great Britain and the United States there is no warranty by the seller that the thing sold is as represented; instead of the equitable rule of *caveat venditor*, "let the seller beware" (which exists in Roman law, Continental European law and allied systems of law[59]), the general rule of English law is the harsh *caveat emptor*, "let the buyer beware".[60] But there is now a tendency in the law of Great Britain and the United States to approach the Roman rule of *caveat venditor*.[61]

In Roman law if the buyer elected to rescind or avoid the sale because of subsequent discovery of a hidden fault, he must bring an action within six months from the date of sale.[62] This action, called the "actio redhibitoria",[63] lay also against the heirs of the vendor.[64] This rescission of a sale was called "redhibitio", and it involved a return of the thing sold to the seller.[65]

In the modern law of those countries recognizing the seller's implied warranty of quality as to the thing sold, the buyer usually may elect to sue for the annulment of the sale.[66] In

[58] *Civil code* of Austria, 922 et seq.; France, 1603, 1641 et seq.; Germany, 459 et seq.; Italy, 1462, 1498 et seq.; Spain, 1461, 1484 et seq.; Porto Rico, 1364, 1387 et seq.; Argentina, 1448; Chile, 1824, 1837, 1857 et seq.; Quebec, 1491, 1522 et seq.; Louisiana, 2475, 2520 et seq.

[59] That is, Latin America, South Africa, Japan, etc.: see supra vol. i, §§ 258, 268, 278, 307, 313.

[60] Williams, *Inst. of Justinian*, p. 201; Benjamin, *Sales*[6], pp. 573, 640.

[61] Especially in granting rescission to the buyer for misrepresentation by the seller: see Moyle, *Sale*, p. 190, note 5; Benjamin, *Sales*[6], p. 641; English Sale of Goods Act, § 13, and American Uniform Sales Act, § 14 (implied warranty in sale of goods by a description that the goods correspond with the sample); 25 Green Bag, 324 (Judge Morrison's address on professional ethics). The Uniform State Acts are discussed in vol. i, § 408.

[62] *Dig.* 21, 1, frag. 19, § 6; frag. 38, pr.; frag. 55; *Dig.* 44, 2, 25, § 1; *Code*, 4, 58, 2. In a few cases the period of time was limited to two months: *Dig.* 21, 1, frag. 28 and frag. 38, pr.

[63] *Dig.* 21, 1, 23, § 7. See supra § 780, first footnote.

[64] *Dig.* 21, 1, 23, § 5. This action could be brought against a principal who had acted through an agent: *Dig.* 14, 3, 17; see *Dig.* 21, 1, 23, § 4.

[65] *Dig.* 21, 1, 19, § 6. See *Dig.* 21, 1, 21, pr.

[66] See for instance *Civil code* of France, 1644; Germany, 487; Italy, 1501; Spain, 1486; Porto Rico, 1389; Chile, 1860; Louisiana, 2520 et

some countries the Roman period of six months has survived[67]; in others the period has been increased.[68] This rescission by the buyer is described by terms indicative of a Roman origin: in the law of Louisiana it is called "redhibition", and the action the "redhibitory action"; in Spanish law, "redhibición" and "acción redhibitoria"; in Italian law the action is called "azione rednibitoria"; and in French law the defects are called "rédhibitoires".[69]

In Roman law if the buyer elected to sue for a reduction of the price because of subsequent discovery of a hidden fault, he must bring an action within one year from the date of the sale.[70] In the modern law of those countries recognizing the seller's implied warranty of quality as to the thing sold, the buyer usually may elect to sue for a reduction of the price.[71] The Roman period of one year still exists in the law of Louisiana.[72]

Obligations of the buyer. In the absence of special agreement the obligations of the buyer were, in Roman law, as follows. 1. He must pay the price of the sale on delivery § 791

seq. But German law gives the buyer no choice except to demand rescission — the buyer cannot elect to sue for a reduction of the price: *Civil code*, 487.

[67] See for instance *Civil code* of Austria, 933; Spain, 1490 (in some cases of redhibition 40 days, 1496); Porto Rico, 1393 (in some cases 40 days, 1399).

[68] *Civil code* of Louisiana, 2534 (but in Louisiana the Roman period of two months in certain cases of redhibition still exists, art. 2535); France, 1648 ("un bref délai," which as to some kinds of property may be 10 years, — Wright, *French civil code*, p. 312, note "o"); Austria, 933 (3 years as to immovables); Germany, 482 (fixed by Imperial Ordinance of March 27, 1899).

[69] *Civil code* of Louisiana, 2520, 2522; Spain, 1491, 1499; Italy, 1505; France, 1648.

[70] The *actio quanti minoris* or *actio aestimatoria:* see *Dig.* 21, 1, frag. 19, § 6; frag. 38, pr.; *Code*, 4, 58, 2; supra § 780, first footnote.

[71] See for instance *Civil code* of France, 1644; Italy, 1501; Spain, 1486; Porto Rico, 1389; Chile, 1860; Louisiana, 2541. But German law does not allow a suit for reduction of the price — the buyer can sue only for rescission: *Civil code*, 487.

[72] *Civil code*, 2544. As to the period of time in other countries, see supra fourth footnote immediately preceding.

of the thing sold[73]; if he did not, he was liable for interest.[74] Modern law is the same.[75] 2. He must receive the delivery of the thing sold.[76] Modern law is the same.[77] 3. He must reimburse the seller for the cost of keeping the thing sold until its delivery.[78] This is law also in some modern countries.[79]

2. LETTING AND HIRING (LOCATIO ET CONDUCTIO)

§ 792 **Letting and hiring defined.** In both Roman and modern law, hire is a contract whereby one person either places something at the temporary use of another or agrees to work for him, in return for a fixed[80] remuneration.[81] The person letting the thing for use or hiring the service is known variously as landlord, lessor, the person letting, or employer.[82] The

[73] *Dig.* 19, 1, 11, § 2. But see *Code*, 4, 49, 7.

[74] *Dig.* 19, 1, 13, §§ 20 and 21. But the seller might reserve for himself, at the time of the sale, a lien (supra § 624) on the thing sold until the price was paid: argued from *Code*, 8, 17 (18), 7, by Mackeldey (Dropsie), *Roman law*[14], § 351. The *vendor's lien* for the payment price is found in modern law: see Benjamin, *Sales*[6], p. 778.

[75] See for instance *Civil code* of France, 1650–52; Louisiana, 2549–53; Italy, 1507, 1509; Spain, 1650–51; Porto Rico, 1403–4; Benjamin, *Sales*[6], pp. 253–4; Parsons, *Contracts*[8], vol. iii, p. 111 ("for goods sold interest accrues after the day of payment; and if sold for cash, it begins from the date of the delivering of the goods").

[76] He could be compelled to remove the thing sold by the *actio venditi:* see *Dig.* 19, 1, 9.

[77] See for instance *Civil code* of Louisiana, 2549; American Uniform Sales Act, § 41.

[78] *Code*, 4, 49, 16; Dig. 19, 1, 13, § 22.

[79] *Civil code* of Louisiana, 2555.

[80] In English law, the remuneration, if not fixed, may be implied as in sale: Williams, *Inst. of Justinian*[2], p. 217; supra § 784.

[81] In Roman law the landlord or employer could enforce his rights against the tenant or workman by the following actions: 1. *Actio locati.* 2. *Actio furti* (see *Dig.* 19, 2, 42). 3. The action arising from the lex Aquilia (see *Dig.* 19, 2, 25, § 5; *Dig.* 19, 2, 43). 4. Interdict *quod vi aut clam* (see *Dig.* Id.), 5. *Actio arborum furtim caesarum* (see *Dig.* Id.). The tenant, hirer, or workman could enforce his rights against the landlord or employer by the following actions. 1. *Actio conducti.* 2. Interdict *de migrando* (see *Dig.* 43, 32, frag. 1, pr., and § 6; frag. 2).

[82] "Locator" is the generic word used in Roman law.

person hiring the thing or agreeing to perform the service is known variously as the hirer, tenant, lessee, workman, or employee.[83] The remuneration is known variously as hire, rent, or wages.[84]

The name itself of the Roman letting and hiring, "locatio", has survived in the Italian "locazione". There are two varieties of the contract of letting and hiring: the letting of things and the hiring of services.[85]

The two kinds of letting and hiring: (1) letting of things. § 793 Anything movable or immovable, not consumed by use,[86] may be let for hire. In this category is the letting of houses and lands.[87] The obligations of a landlord include the following. 1. To put the tenant in possession and to guarantee him peaceful possession.[88] 2. To deliver and keep the premises in good repair.[89] 3. To allow the tenant to sublet.[90] 4. To allow the tenant to remove fixtures, provided such removal does not injure the house.[91]

[83] "Conductor" is the ordinary Roman word. But the tenant of a house is called "inquilinus", and the tenant of a farm, "colonus".

[84] "Merx" is the generic Roman word. But there are others: "pensio" (rent of a house), "reditus" (rent of a farm), "manupretium" (wages, — *Dig.* 19, 2, 30 § 3). The remuneration did not have to consist entirely of money, — part of it might consist of something else: *Dig.* 19, 2, 19, § 3 (corn in part payment of rent to a landlord).

[85] ROMAN LAW: *Dig.* 19, 2, frag. 1, frag. 3, frag. 22, § 1. MODERN LAW: *Civil code* of Austria, 1090, 1151; France, 1708; Germany, 535, 611; Italy, 1568; Spain, 1542; Louisiana, 2669; Chile, 1915; Williams, *Inst. of Justinian illustrated by English law* [2], p. 214. Although the contract of letting and hiring is governed by many of the rules applicable to sale (see supra § 780 et seq.), it differs from sale in that, unlike sale, it is not designed to transfer the ownership of a thing.

[86] See supra §§ 561, 563, 565.

[87] In Roman law a house is often referred to as "praedium urbanum", and a farm as "praedium rusticum". See supra §§ 598, 607, 610.

[88] *Dig.* 19, 2, frag. 15, § 1; frag. 25, § 1; frag. 9, pr. But see *Dig.* 19, 2, 30, pr. The subject of *eviction* is treated supra § 789.

[89] *Dig.* 19, 2, frag. 15, § 1; frag. 58, § 2; frag. 25, § 2. In Roman law, failure of the landlord to make repairs gave the tenant a right to demand either a reduction of the rent or a rescission of the contract: *Dig.* 19, 2, frag. 25, § 2 and frag. 27. But in Roman law the tenant had to make trifling repairs.

[90] *Dig.* 19, 2, 48, pr.; *Code*, 4, 65, 6.

[91] *Dig.* 19, 2, 19, § 4. As to fixtures, see supra § 640.

The obligations of the tenant, in the absence of special agreement, include the following: 1. To pay the rent when due [92] or else suffer eviction by the landlord.[93] And the tenant must continue to pay his rent until the expiration of his tenancy even if he abandons the premises.[94] 2. To take the greatest care of the property.[95] But the tenant is not responsible for its loss due to unavoidable accident.[96] 3. To surrender possession to the landlord at the time agreed upon.[97] But the death of the tenant does not put an end to the contract[98]: the heir of the tenant takes his place and has the same rights and duties until the expiration of the tenancy.[99]

§ 794 **The two kinds of letting and hiring: (2) hiring of services.** Any lawful service having a market price may be hired.[100] If an employee does manufacturing or works upon materials furnished by his employer, the contract is one of hire; but if the materials are furnished by the workman himself, the contract is one of sale.[101] The employer must pay the employee his wages at the time agreed upon.[102] A hiring of services is always terminated by the death of the workman.[103]

[92] Mackeldey (Dropsie), *Roman law* [14], § 411. A tenant in arrears of rent was liable for interest: *Dig.* 22, 1, 17, § 4; *Code*, 4, 65, 17. For cases of special agreement as to the rent, see Hunter, *Roman law* [4], pp. 510–11.

[93] *Dig.* 19, 2, frag. 54, § 1; frag. 60, pr. See *Code*, 4, 65, 3.

[94] *Dig.* 19, 2, frag. 24, § 2; frag. 55, § 2. Only a reasonable excuse would relieve the tenant of this obligation; reason to fear that the house will fall down was such an excuse: *Dig.* 19, 2, 27, § 1.

[95] *Dig.* 19, 2, 31; *Dig.* 13, 6, 5, § 2. See *Inst.* 3, 24, 5. Negligence in performance is treated supra § 732.

[96] *Code*, 4, 65, 28. See supra § 737.

[97] *Code*, 4, 65, 33; *Dig.* 19, 2, 48, § 1. See *Code*, 4, 65, 25. The Emperor Zeno made it a criminal offense to fight a landlord's title without surrendering possession: *Code*, 4, 65, 32.

[98] *Code*, 4, 65, 10.

[99] *Inst.* 3, 24, 6.

[100] *Dig.* 19, 5, 5, § 2. The services in this contract were called "operae". But services compensated by fees (*honoraria*) did not fall within this contract.

[101] Gaius, 3, 147; *Inst.* 3, 24, 4. On the subject of the hiring of services, see cases given in Hunter, *Roman law* [4], pp. 511–14.

[102] *Dig.* 19, 2, frag. 38, pr.; frag. 19, §§ 9–10: frag. 15, § 6. Roman law allowed the employee to recover interest if his wages were in arrears: *Code*, 4, 65, 17.

[103] *Code*, 4, 65, 10.

3. PARTNERSHIP (SOCIETAS)

Partnership defined. In both Roman and modern law, § 795
partnership is a contract by which two or more persons agree to unite their property or labor with the object of dividing the gain.[104] A partner must contribute either property or labor.[105] The name itself of the Roman "societas" or partnership has survived in the French "société", the Italian "società", and the Spanish "sociedad".

Roman varieties of partnership. In Roman law there were § 796
four kinds of partnership: universal, commercial, partnership for conducting a business, and partnership for a single transaction. 1. *Universal partnership* (societas omnium bonorum[106]). This kind of 'partnership' was really a species of joint ownership originating at an early date in Roman law.[107] It embraced not only the present property of each 'partner', but also all his after-acquired or future property no matter how obtained.[108] Universal 'partnership' has descended into

[104] ROMAN LAW: Although the Roman law lacks a definition of partnership, its elements are given in *Code*, 4, 37, 1; *Inst.* 3, 25, 2. The purpose of a partnership must be lawful or moral: *Dig.* 17, 2, 57. The action which one partner could bring against another to enforce his rights was the *actio pro socio* (see *Dig.* 17, 2, frag. 43; frag. 27; frag. 38; frag. 63, pr.; *Dig.* 42, 1, 22, § 1). An injured partner might also bring the *actio communi dividundo*, or the *actio legis Aquiliae*, or the *actio furti* (see Dig. 17, 2, frag. 47, § 1; frag. 49–51; frag. 45–6). MODERN LAW: *Civil code* of Austria, 1175; France, 1832–3; Germany, 705–6; Italy, 1697–8; Spain, 1665; Porto Rico, 1567; Chile, 2053, 2055; Louisiana, 2801; Williams, *Inst. of Justinian illust. by English law* [2], p. 220; Parsons, *Contracts* [8], vol. i, p. 165; Robinson, *El. law* [2], § 166.

[105] ROMAN LAW: *Dig.* 17, 2, 5, § 1. MODERN LAW: See the immediately preceding footnote.

[106] So described in *Dig.* 17, 2, 1, § 1. See Gaius, 3, 148; *Inst.* 3, 25, pr.

[107] Aulus Gellius, 1, 9, 12. If the **joint ownership** (*societas unius rei vel certarum rerum*) was created by the act of the co-owners, the rights of each joint owner were secured by the *actio pro socio*; but if the joint ownership arose otherwise, the proper action was either the *actio communi dividundo* or the *actio familiae erciscundae*: see *Dig.* 17, 2, 34; supra § 644; Hunter, *Roman law* [4], p. 519.

[108] *Dig.* 17, 2, frag. 3, § 1; frag. 73. For instance, it included whatever a partner acquired by legacy, inheritance, or gift. But future property did not become joint property until given by a 'partner' to his 'co-partners': *Dig.* 17, 2, 74.

the law of some modern countries, for instance Austria, France, Italy, Spain, and Louisiana.[109]

2–3. *Commercial partnership* (societas universorum quae ex quaestu veniunt[110]), and *partnership for conducting a business* (societas alicujus negotiationis).[111] The former variety of partnership was an ordinary mercantile or commercial partnership[112]; the latter variety was a partnership for carrying on a business or profession.[113] Both embraced all the property of the partners.[114] In the absence of any special agreement by the partners, it was presumed in Roman law that a commercial partnership was formed.[115] Commercial and business partnerships are recognized in modern law.[116]

4. *Partnership for a single transaction* (societas rei unius[117]). This form of 'partnership' was instituted for a single transaction, for instance a joint purchase of something.[118] This variety of 'partnership' is connected with the subject of joint ownership.

§ 797 **Relations of the partners between themselves.** Unless there is an express agreement as to the division of the profit and loss, an equal division of both is intended.[119] But no partner-

[109] *Civil code* of Austria, 1177; France, 1835–40; Italy, 1697–1704; Spain, 1671–7; Porto Rico, 1573–9. It is forbidden in Chilean law: *Civil code*, 256.

[110] So described in *Dig.* 17, 2, 7.

[111] So described in *Dig.* 17, 2, 5, pr.

[112] See *Dig.* 17, 2, frag. 8; frag. 52, § 5.

[113] Gaius, 3, 148; *Inst.* 3, 25, pr.; *Dig.* 17, 2, frag. 5, pr.; frag. 52, §§ 4–5. The *societas vectigalis*, formed to collect the Roman taxes, was a peculiar form of this variety of partnership; see *Dig.* 17, 2, 59.

[114] *Dig.* 17, 2, 13; *Dig.* 29, 2, 45, § 2. But each partner kept as his separate property all future acquisitions by legacy, succession, or gift: *Dig.* 17, 2, frag. 7–13.

[115] *Dig.* 17, 2, 7.

[116] See for instance *Civil code* of France, 1841–42; Louisiana, 2824, 2827, 2835; Italy, 1705–6; Spain, 1678; Porto Rico, 1580; Williams, *Inst. of Justinian*[2], p. 220; Robinson, *El. law*[2], § 166; Schuster, *German law*, pp. 50–53.

[117] So described in *Dig.* 17, 2, 5.

[118] *Dig.* 17, 2, frag. 5; frag. 58, pr.

[119] ROMAN LAW: Gaius, 3, 150; *Inst.* 3, 25, 1. But a partner's profit need not be proportional to his capital contributed: *Dig.* 17, 2, 5, § 1. MODERN LAW: see for instance *Civil code* of France, 1853; Louisiana, 2865; Spain, 1689; Germany, 722.

ship is established when one partner is to bear all the loss and does not share in the profits.[120] Both Roman and English law holds to be valid, as between the partners, a contract of partnership in which one partner shall not share in the loss although participating in the profits.[121] But French, Spanish, and Louisiana law holds such a contract to be invalid.[122]

§ 798 **Relations of the partners to third parties: difference between Roman and modern law as to the rule of implied agency of a partner to bind his co-partners.** There is little in Roman law as to the relations of partners to persons not partners.[123] The Roman law of partnership differed in one marked respect from the modern law: there was no implied agency in partnership. Or in other words, in Roman law no partner was bound by the acts of his fellow partner as to transactions with third persons; the third party could hold responsible only that partner who transacted the business with him.[124] The reason of this is that the Roman law only partially worked out the modern doctrine of representation in agency, as will subsequently be shown.[125]

§ 799 **Dissolution of partnership.** In both Roman and modern law a partnership is dissolved as follows: by the death or withdrawal of one partner, and also by the expiration of the time fixed for the duration of the partnership.[126]

[120] ROMAN LAW: This contract was called a **societas Leonina**, and it was invalid as a partnership: *Dig.* 17, 2, 29, § 2. It was without a valuable consideration. MODERN LAW: *Civil code* of France, 1855; Louisiana, 2814; Spain, 1691.

[121] ROMAN LAW: *Inst.* 3, 25, 2. ENGLISH LAW: Williams, *Inst. of Justinian* [2], p. 223; Parsons, *Contracts* [8], vol. i, p. 175, section VII.

[122] *Civil code* of France, 1855; Spain, 1691; Porto Rico, 1593; Louisiana, 2813–14.

[123] For the most complete discussion of this, see Mackeldey (Dropsie), *Roman law* [14], § 422.

[124] See *Dig.* 17, 2, frag. 82; frag. 28; frag. 63, § 3; *Code*, 4, 2, 13; Hunter, *Roman law* [4], pp. 521, 617–21. For the modern Anglo-American law of implied agency in partnership, see Parsons, *Contracts* [8], vol. i, p. 182.

[125] See infra § 802.

[126] ROMAN LAW: Gaius, 3, 151–2; *Inst.* 3, 25, 4 and 5; *Code*, 3, 37, 5; *Dig.* 17, 2, 65, § 6. To go to court to secure one's rights as a partner dissolved the partnership: *Dig.* 17, 2, 65, pr. See also *Dig.* 17, 2, 14. MODERN LAW: see for instance *Civil code* of Austria, 1205–7; France, 1865;

4. AGENCY (MANDATUM)

§ 800 **Agency (mandatum) defined.** In both Roman and modern law, agency is a contract by which one person, called the agent, represents another, called the principal, in dealings with third persons. The Roman mandatum[127] was agency without remuneration or gratuitous agency.[128] Mandatum was the only consensual contract that was gratuitous: all the rest are for a valuable consideration.[129] If a remuneration was fixed for the service rendered, the contract became one of hiring.[130] But although the Roman mandatum was agency without remuneration, its fundamental rules as to the scope, revocation, and dissolution of an agent's authority underlie the modern law of all agency.[131]

The name itself of the Roman agency, "mandatum", has survived in the Louisiana "mandate", the French "mandat", the Italian and Spanish "mandato". And along with

Germany, 724, 726–7; Italy, 1729; Spain, 1700; Porto Rico, 1602, Louisiana, 2876; Williams, *Inst. of Justinian* [2], p. 223; Parsons, *Contracts* [8], vol. i, pp. 202–14.

[127] There were two varieties: *mandatum simplex*, or agency undertaken for the benefit of the principal; *mandatum qualificatum*, or agency undertaken for the benefit of a third person — in other words, suretyship formed by a contract of agency (see supra § 768, second footnote). There was also in Roman law a peculiar class of agents called brokers (*proxenetae*), who transacted mercantile business or commission for both parties: see *Dig.* 50, 14.

[128] Gaius, 3, 162; *Inst.* 3, 26, 12. The principal was called in Roman law a "mandator" or "mandans"; and the agent was called by the medieval Civilians "mandatarius." There are other English translations of mandatum: "commission" (Sohm-Ledlie [3], *Roman law*, p. 407); and "mandate" (Hunter, *Roman law* [4], p. 482; Mackenzie, *Roman law* [5], p. 253; Abdy and Walker, *Inst. of Justinian*, p. 324; *Civil code* of Louisiana, 2985). The principal could enforce his rights against the agent by bringing the *actio mandati directa* (an agent adjudged guilty of a wilful breach of duty was punished by infamy: *Dig.* 3, 2, 1; supra § 453). The agent could enforce his rights against the principal by bringing an *actio mandati contraria* (he could sue for fees, *honoraria*, — see *Code*, 4, 35, 1).

[129] Consideration is defined supra § 750.

[130] Gaius, 3, 162; *Inst.* 3, 26, 13; see supra § 794.

[131] See infra vol. iii, § 1013.

the name has survived, in a modified form, the fundamental Roman conception of mandatum: in the law of these countries agency is gratuitous unless a contrary agreement has been made.[132]

The Roman mandatum is also the parent of the English contract of "mandate", which is a bailment or delivery of property to a person in order to have some act done concerning the property without remuneration.[133] Early in the 18th century Lord Holt, in the famous case of *Coggs* v. *Bernard*,[134] followed the 13th century English jurist Bracton and applied the Roman law of mandatum, in holding liable a person, who, though not a common carrier and receiving no pay for the service, negligently stove in some hogsheads of brandy which he was transporting from one wine cellar to another.[135] The very fact that his services were gratuitous made a case in point with the Roman contract of mandatum which is essentially gratuitous.[136]

§ 801 **Creation of agency. Establishing an agency by ratification or the subsequent confirmation of acts of a person acting as agent.** In both Roman and modern law an agency may be made unconditionally or conditionally or to take effect from a specified future time.[137] When any person contracts as agent and his acts are subsequently confirmed or ratified by the undisclosed party entitled to be principal, an agency is established by ratification.[138]

[132] *Civil code* of France, 1986; Louisiana, 2991; Italy, 1739; Spain, 1711; Porto Rico, 1613.

[133] Story, *Bailments*, § 137; Williams, *Inst. of Justinian* [2], p. 229. The English mandate, unlike the Roman mandatum, is confined to movables. The contract of gratuitous agency exists widely in modern law: see immediately preceding footnote and *Civil code* of Germany, 662–76; Chile, 2117; Argentina, 1905.

[134] 1 Lord Raymond's Rep. 609, decided in 1703.

[135] *Id.* As to Bracton, see vol. i, § 374.

[136] *Id.*

[137] *Inst.* 3, 26, 12.

[138] ROMAN LAW: *Dig.* 46, 3, 12, § 4 ("ratihabitio mandato comparatur"); *Dig.* 50, 17, 60; *Dig.* 46, 8, 5. See also *Code*, 5, 16, 25; *Code*, 4, 28, 7; *Dig.* 50, 17, 152. MODERN LAW (Great Britain and the United States): Broom, *Legal maxims*, p. 807; Parsons, *Contracts* [8], vol. i, p. 48.

§ 802 **Extent of an agent's authority.** In both Roman and modern law, instructions to commit an unlawful act are not binding on the agent.[139] An agent must not exceed his authority.[140]

Although the relation of principal and agent was firmly established in Roman law, yet as a general rule the agent alone, and not the principal, was bound by his transactions with third parties. But to this rule there were several large exceptions making the principal liable: (1) a slave could bind his master[141]; (2) a child or descendant in power could bind his father or head of the family[142]; (3) the captain of a ship (magister navis) could bind the owner of the ship for repairs and expenses necessary for the ship[143]; (4) the manager (institor) of a business in a shop or store could bind the principal owner of the business.[144]

Now modern law has completed the doctrine of representation in agency by making the principal liable to third parties in *all* cases; in other words, modern law has made the exceptional Roman rule of the principal's liability the general rule in agency.

§ 803 **Duration and termination of agency.** In both Roman and modern law, agency is terminated as follows: 1. By expiration

[139] ROMAN LAW: Gaius, 3, 157; *Inst.* 3, 26, 7. MODERN LAW: See for instance Benjamin, *Principles of contracts* [3], p. 86 (American law).

[140] ROMAN LAW: Gaius, 3, 161; *Inst.* 3, 26, 8; *Dig.* 17, 1, 5, § 1. MODERN LAW: See for instance Williams, *Inst. of Justinian* [2], p. 232; Parsons, *Contracts* [8], vol. i, pp. 43, 57.

[141] Gaius, 4, 70 and 73; *Inst.* 4, 7, §§ 1, 4 and 8; *Inst.* 4, 6, 8; *Dig.* 14, 4; Hunter, *Roman law* [4], pp. 614–16. The master (*dominus*) or principal was made liable to third parties by the following actions: *actio de peculio, actio tributoria, actio quod jussu, actio de in rem verso.* See supra §§ 434 et seq.

[142] Gaius, 4, 70 and 73; *Inst.* 4, 7, §§ 1 and 8; *Inst.* 4, 6, 8; Hunter, *Roman law* [4], pp. 614–16. The paterfamilias or principal was made liable by the following actions: *actio quod jussu, actio de in rem verso, actio de peculio.* See supra §§ 446, 506 et seq.

[143] Gaius, 4, 71; *Inst.* 4, 7, 2; *Dig.* 14, 1. See Hunter, *Roman law* [4], pp. 617–18, 621–3. The principal or owner (*exercitor*) was made liable to third parties by the *actio exercitoria.* English law is the same as the Roman: see Parsons, *Contracts* [8], vol. i, p. 82 (shipmasters).

[144] Gaius, 4, 71; *Inst.* 4, 7, 2 and 8; *Dig.* 14, 3. See Hunter, *Roman law* [4], pp. 618–23. The principal or owner (*dominus*) was made liable to third parties by the *actio institoria.*

of the agent's authority or by completion of the business for which the agency was established.[145] (§ 803)

2. By the principal's revocation of the agent's authority.[146] And the principal may revoke the agent's authority before the latter begins to act upon it.[147]

3. By the agent's resignation or renunciation of his authority.[148] But the resignation must not be untimely: if the renunciation is made at a time when the principal cannot accomplish his object without suffering a detriment, the latter can bring an action at law against the agent.[149]

4. By the death of either the agent or the principal.[150] But the death of the principal must be made known to the agent: the latter is justified in executing his commission or business as agent after the death of the principal, of which event he was in ignorance.[151]

[145] ROMAN LAW: Moyle, *Inst. of Justinian*, vol. i, 5th ed., p. 455 MODERN LAW: see for instanec *Civil code* of Chile, 2163.

[146] ROMAN LAW: Gaius, 3, 159, *Inst.* 3, 26, 9; Dig. 17, 1, 15. MODERN LAW: *Civil code* of France, 2003; Germany, 671; Italy, 1757; Spain, 1732; Porto Rico, 1634; Louisiana, 3027; Parsons, *Contracts* [8], vol. i, p. 70 (Anglo-American law).

[147] ROMAN LAW: Gaius, 3, 159; *Inst.* 3, 26, 9. MODERN LAW: Story, *Agency*, § 202; Williams, *Inst. of Justinian* [2], p. 233.

[148] ROMAN LAW: *Inst.* 3, 26, 11; *Dig.* 17, 1, frag. 22, § 11; frag. 23–5. MODERN LAW: see for instance *Civil code* of France, 2003, 2007; Germany, 671; Italy, 1757; Spain, 1732, 1736; Porto Rico, 1634, 1638; Louisiana, 3027, 3031; Chile, 2163, 2167.

[149] *Id.* See also *Code*, 3, 1, const. 13, § 9; const. 14, § 1.

[150] ROMAN LAW: Gaius, 3, 160; *Inst.* 3, 26, 10. MODERN LAW: *Civil code* of France, 2003; Germany, 673; Italy, 1757; Spain, 1732; Porto Rico, 1634; Louisiana, 3027; Chile, 2163; Williams, *Inst. of Justinian illustrated by English law* [2], p. 233; Parsons, *Contracts* [8], vol. i, pp. 73–4.

[151] ROMAN LAW: Gaius, 3, 160, *Inst.* 3, 26, 10. MODERN LAW: see for instance *Civil code* of France, 2008–9; Italy, 1762; Spain, 1738; Porto Rico, 1640; Louisiana, 3032; Chile, 2173; Parsons, *Contracts* [8], vol. i, p. 73, note (c).

CHAPTER VI

MISCELLANEOUS CONTRACTS

§ 804 **Affreightment or the hiring of a ship, or part of it, for the transportation of goods.** In the ancient world the great means of transportation were ships, transportation by land being comparatively insignificant. Contracts for the hiring of the whole or part of a ship to transport goods were well known in Roman law.[1] If a ship was hired or chartered by a person interested in making a profit out of the voyage, the charterer (exercitor[2]) was, as a general rule, liable on all contracts made by the ship's captain or master for the safety of the ship or its crew or for the success of the undertaking.[3] The contract of affreightment, especially in the form of charter-party, exists in modern law including the Anglo-American.[4]

§ 805 **Banks and banking. Negotiable instruments.** The position of bankers (*argentarii*[5]) was of great prominence during both

[1] *Dig.* 14, 1, 1, § 15; Gaius, 4, 71; *Inst.* 4, 7, 2; *Nov.* 106; Amos, *Roman law*, pp. 210–12; Mackeldey (Dropsie), *Roman law*[14], § 512. Documents similar to the modern bill of lading are mentioned in *Code*, 11, 2 (1), 2 (4).

[2] "Exercitorem autem eum dicimus, ad quem obventiones et reditus omnes perveniunt, sive is dominus navis sit, sive a domino navem per aversionem conduxerit vel ad tempus vel in perpetuum": *Dig.* 14, 1, 1, § 15; see *Inst.* 4, 7, 2. The exercitor might be also a usufructuary, or even possessor in bad faith, of the ship: *Dig.* 7, 1, 12, § 1; *Dig.* 6, 1, 62; *Dig.* 12, 6, 55. See also supra § 586.

[3] *Dig.* 14, 1, frag. 1, §§ 7 and 12; frag. 7; *Inst.* 4, 7, 2. See also supra § 802.

[4] Parsons, *Contracts*[8], vol. ii, pp. 409–14. See also *Id.* vol. i, p. 314. For affreightment in other than Anglo-American law, see infra vol. iii, § 1014.

[5] Other common names for bankers were *nummularii* and *mensularii* (and frequently *argenteae mensae exercitores*, *mensarii*, *negotiatores*): see *Dig.* 2, 13, frag. 9, § 2, frag. 4, pr; Smith, *Dict. of Greek and Roman antiq.*[3], vol. i, p. 181. Originally the *argentarii* were money-changers. Subsequently this function passed to the *nummularii*. It was this latter class who assayed the coins and distributed newly-coined money: *Dig.* 46, 3, 39; Smith, *Id.* But finally all three commonly used terms — *argentarii*,

the Republic and the Empire.[6] Banking, although private (§805)
business, was regarded as a public function.[7] And during the Empire the bankers were under the supervision of the State, banks at Rome being under the control of the city prefect (praefectus urbi), and provincial banks under that of the governor.[8] At Rome the banks were located in the Forum[9]; consequently to become bankrupt was spoken of as "leaving the Forum".[10] During the Empire the bankers were organized into a corporation.[11] Banks were frequently maintained by partnership firms.[12]

The functions of Roman bankers differed but little from those of modern bankers. Roman banks received deposits of money, on which interest might or might not be paid[13]; they made loans[14]; they cashed cheques (*perscriptiones*[15]); they exchanged foreign money for Roman money and vice versa[16]; and they issued foreign bills of exchange.[17] The exercise of

nummularii, *mensularii* — came to refer indiscriminately to bankers: Suetonius, *Aug.* 2 and 4 (Suetonius refers to Augustus' grandfather by all three names); *Dig.* 16, 3, 7, § 2; *Dig.* 42, 5, 24, § 2; *Dig.* 2, 13, 9, § 2. The most complete and recent work on the Roman bankers is Platon, *Les banquiers dans la législation de Justinien*, Paris, 1912.

[6] Bankers at Rome are mentioned as early as 309 B.C. by Livy (ix, 40).

[7] *Dig.* 2, 13, 10, § 1; *Dig.* 42, 5, 24, § 2. See also Gaius, 4, 66, 68 (on *compensatio*, supra § 783); *Inst.* 4. 6, 8–9 (on *actio recepticia*).

[8] *Dig.* 1, 12, 1, § 9; Suetonius, *Galba*, 9; Smith, *Dict.*[3], etc. vol. i, p. 181.

[9] See Livy, ix, 40; xxvi, 11 and 27.

[10] "Foro cedere": *Dig.* 16, 3, 7, § 2.

[11] Waltzing, *Étude hist. sur les corporations prof.*, vol. ii, pp. 114, 232. Justinian mentions such a corporation at Constantinople: *Nov.* 136.

[12] Some of the law as to banking partnerships was peculiar: see *Dig.* 2, 14, frag. 27, frag. 9 and 25. Partnership is defined supra § 795.

[13] See Smith, *Dict.*[3], vol. i, p. 182; Gaius, 3, 131; *Dig.* 16, 3, 7, § 2; Suetonius, *Aug.* 39.

[14] See Plautus, *Curc.* iv, 1 and 19; Tacitus, *Ann.* vi, 17; Smith, *Dict.*[3], vol. i, p. 182.

[15] Cicero, *Atticus*, iv. 18, § 2, ix, 12, 3, xii, 51, 3, *Phil.*, v, 4, *Verres*, v. 19; Horace, *Sat.* ii, 3, 76; Smith, *Dict.*[3], vol. i, p. 182.

[16] Cicero, *Verres*, iii, 78, 180. This exchange of money was called "permutatio". The contract of exchange is defined supra § 761.

[17] For instance Cicero thus supplied his son, while a student at Athens, with money: he deposited money with his friend Atticus, who had debtors in Greece and who then drew a bill payable at some Athenian banker in favor of Cicero's son: see Cicero, *Atticus*, xv, 15, 4; Poste, *Gaius*[4], p. 382.

this last function raises the important question of whether or not Roman law ever worked out the modern doctrine of negotiable instruments.

While there is no doubt whatever that Roman law did make considerable provision for the assignment (assignatio) of obligations ex contractu,[18] the accepted opinion is that *negotiable* instruments — notes and bills — were unknown to Roman jurisprudence.[19] The Roman bill of exchange, a very close approximation to the modern negotiable instrument, lacked negotiability: in other words, it was not fully transferable to bearer or some unknown person.[20] And the Roman bill of exchange can be explained on the basis of assignment or the substitution of a new creditor for the old one.[21] But from the viewpoint of the development of legal principles it may be said without exaggeration that the modern law of negotiable instruments has completed the evolution of the Roman law of assignment of contracts.

§ 806 **Insurance.** Roman law treated as legal the obligation arising from an aleatory contract, the performance of which depends upon some uncertain event — provided the transaction is not of a gambling nature.[22] Although the Romans never developed any contracts of fire or life insurance, they had a contract of maritime loan,[23] the provisions of which were so liberal as to amount to a species of marine insurance and so wide as to be applicable to other lines of insurance recognized in modern law.

Such a transaction was called also "permutatio": Smith, *Dict.*[3], vol. i, p. 182.

[18] *Dig.* 18, 4, 23, pr.; Poste, *Gaius*[4], p. 382; Hunter, *Roman law*[4], pp. 626–8; Mackeldey (Dropsie), *Roman law*[14], § 425 (b).

[19] Poste, *Gaius*[4], p. 384; Williams, *Inst. of Justinian*[2], p. 244. There are no texts of Roman law which predicate the existence of negotiable instruments. The current opinion is that negotiable bills of exchange were probably invented in the Middle Ages at Florence by Jews: 3 *Encyclo. Brit.*[11] 940. See also *Goodwin* v. *Robarts*, L. R., 10 Excheq. p. 346 (1875).

[20] But there are authorities which do not qualify the Roman bill of exchange as non-negotiable: Amos, *Roman law*, p. 209; Smith, *Dict.*[3], vol. i, p. 182.

[21] Poste, *Gaius*[4], p. 382. See supra § 739.

[22] "Si modo in aleae speciem non cadat": *Dig.* 22, 2, 5.

[23] *Nauticum faenus* or *trajecticia pecunia* is treated supra § 756.

The Roman jurist Scaevola gives instances where fishermen and athletes provided against failure in their occupations by obtaining loans payable only if they succeeded in their business.[24] And the same jurist calls the interest the price of the risk.[25] Furthermore, the Roman lawyers were familiar with a fundamental principle of life insurance, the calculation of the natural expectation of life, as is seen from Ulpian's calculation of the value of a life-interest in property. According to his computation, from birth to the 20th year the natural expectation of life is 30 years; from the age of 20 to the age of 25 it is 28 years; from 25 to 30 it is 25 years; from 30 to 35 it is 22 years; from 35 to 40 it is 20 years; from 40 to 50 it is as many years as a person's age is less than 59; from the age of 50 to the age of 55 it is 9 years; from 55 to 60 it is 7 years; while after the age of 60 it is only 5 years.[26]

Certain minor consensual contracts known as pacts (pacta). In Roman law there was a group of minor consensual contracts commonly known by the name of pacts (pacta).[27] Among § 807 these were the promise to pay a debt (*constitutum debiti* or *constituta pecunia*),[28] the promise to create a hypothec (*pactum hypothecae*),[29] the promise to give a dowry (*pactum de dote constituenda*),[30] the promise of a gift (*pactum donationis*),[31]

[24] *Dig.* 22, 2, 5. As to Scaevola, see supra vol. i, § 105.

[25] "Periculi pretium": *Dig.* 22, 2, 5.

[26] *Dig.* 35, 2, 68. As to Ulpian, see supra vol. i, § 108.

[27] These minor consensual contracts were *pacta vestita* (defined supra § 749). On this subject see also Hunter. *Roman law* [4], p. 545.

[28] *Inst.* 4, 6 §§ 8–9; *Dig.* 13, 5; *Code*, 4, 18. This debt might be one's own (*constitutum debiti proprii*, — see supra § 776) or another's (*constitutum debiti alieni* (see supra "suretyship", § 768, second footnote).

[29] *Dig.* 20, 1, 4; *Inst.* 4, 6, 7; *Dig.* 13, 7, 1, pr. As to hypotheca, see supra §§ 615, 618.

[30] *Cod. Theod.* 3, 13, 4 (A.D. 428); *Code*, 5, 11, 6; *Code*, 4, 29, 25; supra §§ 773, 749 (next to last footnote), 478. The earlier Roman law did not permit of a suit on a promised dowry (defined supra § 478), unless the promise was made by stipulation—i. e., *dictio dotis* (considered supra § 773).

[31] *Code*, 8, 53 (54), 35, 5b (A.D. 531); *Inst.* 2, 7, 2; see supra § 657, note. This legislation of Justinian, making valid and enforcing a promise of a

an agreement to refer matters to arbitration (*receptio arbitri*).[32]

§ 808 **Promises and vows of a public or religious nature (pollicitationes, vota).** In Roman law a person was liable on his promise who, in consideration of having received some dignity, agreed to perform some public work for a city.[33] Moreover, if a person solemnly promised to dedicate or consecrate anything to a religious purpose, his vow was binding and he could be compelled to fulfill his vow by the proper religious functionary.[34] If his vow remained unperformed at the time of his death, it was binding upon his heir.[35]

gift, was contrary to the spirit of the earlier Roman law which would not enforce a promise, unless made by stipulation: *Vat. frag.*, 264a, 263, 310, but compare 314. As to stipulation, see supra § 767.

[32] *Dig.* 4, 8, frag. 11, § 3; frag. 13, § 1; frag. 27, § 7; treated supra § 740.

[33] *Dig.* 50, 12, 1; Amos, *Roman law*, pp. 205–6.

[34] *Dig.* 50, 12, 2. In other words, the priests in charge of the temple could compel him to make his vow good.

[35] *Id.*

TITLE III

QUASI CONTRACTS

Quasi contracts defined. In both Roman and modern jurisprudence, quasi contracts are but extensions of the law of contracts to duties similar to obligations arising *ex contractu*. But obligations arising *quasi ex contractu* are not derived from the consent of the parties: quasi contractual obligations arise either from the voluntary act of one of the parties or are imposed by law, — consent may be inferred.[1] The Roman characterization of these obligations as arising "quasi ex contractu" has survived not only in the French "quasi-contrats", the Italian "quasi-contratti", and the Spanish "cuasi contratos", but also in the Anglo-American "quasi contracts". The law of Great Britain and the United States now clearly distinguishes "implied contracts" or "contracts implied in the law" from express contracts formed by agreement of the parties.[2] § 809

The Roman quasi contracts were as follows: volunteer or unauthorized agency; money paid by mistake; jettison and general average[3]; the legal relation between guardian and ward or the person under guardianship; the legal relation between co-owners of property held in common; and the legal relation between heirs and legatees resulting from the

[1] ROMAN LAW: *Inst.* 3, 27 "de obligationibus quasi ex contractu," pr. MODERN LAW: Keener, *Quasi contracts*, ch. i (England and U. S.); *Civil code* of Louisiana, 2293–4; France, 1371; Spain, 1887; Porto Rico, 1788; Italy, 1140; Chile, 2284; see Schuster, *German Civil Law*, § 143. In Roman law, if a statute "created a duty, but did not specify by what action it was to be enforced," the infringing person was held to be liable quasi ex contractu to suffer the penalties prescribed by the statute; and the action brought against him was called *ex lege condicticia:* Abdy and Walker, *Inst.* p. 390; *Inst. of Justin.* 4, 6, 25.

[2] Robinson, *Elementary law* [2], § 255; Keener, *Quasi contracts*, ch. i.

[3] Mackenzie, *Roman law* [7], pp. 262, 266, correctly includes this among the Roman quasi contracts.

vesting of an inheritance of succession. The last three quasi contractual obligations have already been considered.[4]

§ 810 **Volunteer or unauthorized agency (negotiorum gestio).** In Roman law the management of another's affairs without his authority gave rise to an obligation similar to the relation between principal and agent.[5]

The conditions for the management of another's business were as follows: the manager by conducting the business must satisfy some necessity, for instance the death or absence of the owner or his inability to manage the business[6]; a person could not manage another's business if the owner had expressly prohibited all unauthorized management[7]; the manager must always act for the owner's benefit and not for his own[8]; and he must intend in his transactions to bind the owner.[9]

The Roman contract of unauthorized agency or "negotiorum gestio" has survived widely in modern law, for instance in the Quebec "negotiorum gestio", in the French "gestion d'affaires", in the Italian "gestione", in the Spanish and Argentine "gestión de negocios", in the Chilean "agencia oficiosa", and also in German, Japanese, and Louisiana law.[10] In English law there are rights which are reminiscent of the Roman negotiorum gestio: the most important is that of salvage services, which require no preliminary request from those in control of the assisted ship, as a condition precedent

[4] Supra §§ 517, 527, 572, 644, 665, 705. On the legal relations of co-owners, see also Mackeldey (Dropsie), *Roman law*[14], §§ 496–9.

[5] *Inst.* 3, 27, 1; *Dig.* 44, 7, 5, pr.; Hunter, *Roman law*[4], pp. 661–6; Mackeldey (Dropsie), *Roman law*[14], §§ 492–5. See also supra § 800. In unauthorized agency the 'principal' (*dominus rei gestae*) could make the 'agent' (*negotiorum gestor*) account and act by bringing the *actio negotiorum gestorum directa;* and the 'agent' could enforce whatever rights he had against the 'principal' by bringing the *actio negotiorum gestorum contraria.*

[6] *Inst.* 3, 27, 1; *Dig.* 3, 5, 1; *Dig.* 44, 7, 5, pr.

[7] *Dig.* 3, 5, 7 (8), § 3; *Dig.* 17, 1, 40; *Code*, 2, 18 (19), 24.

[8] See *Dig.* 3, 5, 5, § 5.

[9] *Dig.* 3, 5, frag. 26 (27), § 1, frag. 43 (44); *Code*, 2, 18 (19), 11.

[10] *Civil code* of Quebec, 1043; France, 1371; Italy, 1141; Spain, 1888; Argentina, 2322; Chile, 2285; Germany, 677–87; Japan, 697–702; Louisiana, 2295; Schuster, *German civil law*, §§ 143, 301.

to reward.[11] This rule as to salvage is perhaps due to the fact that salvage is a part of our maritime or admiralty law, which to a large extent claims a Roman law origin.[12] § 811

Money paid by mistake (solutio indebiti, condictio indebiti). In Roman law if money not owed has been paid by mistake, it could be recovered by the person making the payment — in other words the person receiving the money became obligated to make restitution.[13] This Roman quasi contract has survived widely in modern law, for instance in French, German, Italian, Spanish, Louisiana, Quebec, Chilean, and Japanese law.[14] Moreover, the English Common Law action of *assumpsit* for money had and received corresponds to the Roman condictio indebiti.[15]

In both Roman and modern law, money paid under a mistake of *fact* can be recovered.[16] But whether money paid under a mistake of *law* could be recovered in Roman law is disputed.

[11] Williams, *Inst. of Justinian* [2], p. 235; Benedict, *Admiralty* [3], § 300b.

[12] Roscoe, *Admiralty practice*, introduction.

[13] *Inst.* 3, 27, 6. Gaius four centuries earlier, had placed this subject among the *real* contracts (defined supra § 752): Gaius, 3, 91. But Justinian, although appreciating this resemblance (*Inst.* 3, 14, 1), correctly regarded money paid by mistake as productive of a quasi contractual obligation. The person paying money by mistake could recover it by bringing against the person receiving the money an action known as the *condictio indebiti* (see *Dig.* 22, 3, 25, pr. and § 1. As to the measure of damages in this action, see *Dig.* 12, 6, frag. 65, §§ 6–8, frag. 26, § 12; *Inst.* 3, 27, 7 (*lis crescens*). The subject of money paid by mistake has been given an exhaustive treatment by Mackeldey (Dropsie), *Roman law* [4], §§ 500–2; Hunter, *Roman law* [4], pp. 657–61.

[14] *Civil code* of France, 1376–7; Germany, 812–5; Italy, 1145; Spain, 1895–1901; Porto Rico, 1796–1802; Louisiana, 2301; Quebec, 1047; Chile, 2295–2303; Japan, 703–8.

[15] Mackenzie, *Roman law* [7], p. 266, note. 1. See Robinson, *Elementary law* [1], § 262, *El. law* [2], § 255.

[16] ROMAN LAW: "Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est": *Code*, 1, 18, 10. But excusable mistakes of fact are only those which a man of ordinary carefulness cannot avoid: *Dig.* 22, 6, frag. 9, § 2, frag. 6, frag. 3, § 1. MODERN LAW: Williams, *Inst. of Justinian* [2], p. 174; *Wilson* v. *Sinclair*, 4 Wilson and Shaw's App. Cases, 398; Pollock, *Contracts*, ch. viii; *Civil code* of France, 1377; Louisiana, 2310; Italy, 1146; Spain, 1895, 1897, Porto Rico, 1796, 1798, Chile, 2295; Argentina, 818; Schuster, *German civil law*, p. 352, note 1.

(§811) There is a text in the Code which holds that money paid under a mistake of law is not recoverable.[17] And this is the opinion of the greatest Civilians, such as the French Cujas and Doneau, the Dutch Voet, and the German Savigny.[18] This interpretation of the Roman law is the doctrine of English law, which holds that there is no recovery of money paid under a mistake of law.[19]

But a contrary opinion has been advanced by other renowned Civilians, such as the Dutch Vinnius and the French Aguesseau, that Roman law always permitted the recovery of money paid under any mistake, not only of fact but also of law.[20] This doctrine of Vinnius was adopted in the French Civil Code which provides that "when a person, believing himself to be a debtor, has paid a debt by *mistake*, he has a right of recovery against the person receiving the money."[21] Similar to Vinnius' interpretation of the Roman law (which opinion is embodied in French law) is the law of many other

[17] "Cum quis jus ignorans indebitam persolverit, cessat repetitio": *Code*, 1, 18, 10. This harmonizes with the maxim that ignorance of the law excuses no one: see supra § 423.

[18] Savigny's learned opinion (*System*, vol. iii, appendix viii) is irrefutable. He denies that Roman law gave any recovery, except in the rare case of a person being able to prove that his ignorance of law is excusable and is not due to gross negligence. See also Voet, *Pand.* xii, 6, § 7; Pothier, *Traité de l'action condict. indebt.*[2], vol. ii, p. 782. As to these Romanists above mentioned, see supra vol. i, §§ 245, 246, 250, 266, 346.

[19] Mackenzie, *Roman law*[7], p. 266; Williams, *Inst. of Justinian*[2], p. 174; Parsons, *Contracts*[8], vol. i, p. 342; *Wilson* v. *Sinclair*, 4 Wilson and Shaw's App. Cases, 398; *Bilbie* v. *Lumley*, 2 East, 469.

[20] These Romanists claim that because the *condictio indebiti* was based on equity, therefore this action could be defeated only by exhibiting an equitable defense; and that *Dig.* 12, 6, on *condictio indebiti*, grants restitution for *mistake* and does not limit it merely to mistake in fact; and that the Code text, denying restitution for mistake of law, needs explanation: see Mackenzie, *Roman law*[7], p. 264 and footnote 6; Vinnius, *Inst.* iii, 28, *Questiones*, i, 47. As to Vinnius and Aguesseau, see supra vol. i, §§ 251, 266.

[21] Art. 1377. The italics are mine.

modern countries, such as Germany, Italy, Spain, Chile, Argentina, Quebec, and Louisiana.[22]

Jettison and general average (lex Rhodia de jactu). The modern law of every civilized country in the world is debtor to Roman jurisprudence for the following humane and equitable principle of law: that the sacrifice of the whole or part of a ship at sea or its cargo, in a case of extreme peril, in order to save the ship or its passengers, is to be made good by the contribution of those benefited.[23] § 812

An interesting acknowledgment of the Roman origin of this doctrine is found in a celebrated American case: where the captain of a ship ran her ashore to save his passengers, and the lives of all were saved, although the vessel became a total loss, this voluntary stranding of the ship to preserve life was held by the Supreme Court of the United States in 1839 to give rise to general average; and a suit brought by the owners of the vessel against the insurers for contribution was held to be well founded in law.[24] Mr. Justice Story, who wrote the decision, traced the rule concerning general average to Digest, book 14, title 2, extracts from which he incorporated as authorities in his opinion.

[22] Schuster, *German Civil Law*, p. 351, note 1; *Civil code* of Italy, 1145; Spain, 1895; Porto Rico, 1796; Chile, 2295; Argentina, 818; Quebec 1047; Louisiana, 2310.

[23] ROMAN LAW: *Dig.* 14, 2; Mackeldey (Dropsie), *Roman law* [14], § 417. That traditional belief that Rome obtained all maritime law from the Greek city of Rhodes is without solid foundation; outside of the Roman law of jettison and general average — admittedly of Rhodian origin — the credit for Roman maritime law should be given to the Roman jurists. This view of Benedict (*The Rhodian law*, 18 Yale law Journal, p. 242) is correct. In his *Rhodian sea law*, Mr. Ashburner has edited an unofficial compilation of the era of the Eastern Roman or Byzantine Empire between the 7th and 9th centuries, which book relates how the Emperor Tiberius, the successor of Augustus, caused an inquiry to be made into the maritime law of Rhodes, and that the results were confirmed by subsequent emperors. See also supra § 574. MODERN LAW: see for instance Parsons, *Contracts* [8], vol. ii, pp. 433–42; *Code of commerce* of France, 397–429; Germany, 700–33; Italy, 642–59; Spain, 806–18, 840–69; Japan, 641–52; Argentina, 1283–1350; Chile, 1084–1135; Mexico, 915–44; *Civil code* of Quebec, 2551–67; Louisiana, 3424.

[24] *Columbian Ins. Co.* v. *Ashby*, 13 Peters, Rep., 331.

TITLE IV

TORTS OR DELICTS (DELICTA, MALEFICIA)

CHAPTER I

GENERAL PRINCIPLES OF TORTS OR DELICTS

Tort or delict defined. In both Roman and modern jurisprudence a tort or delict is an injurious act which makes the offender liable in an action at law to give pecuniary satisfaction for the wrong or damage suffered by the offended party.[1] But the heir of the person committing the tort is not liable to the injured party.[2] Both Roman and English law have the same maxim that "no one can better his condition by his own wrongful act."[3] The name itself of the Roman "delicta" has survived in the French "délits", the Italian "delitti" and the Spanish "delitos". In the law of Great Britain and the United States obligations arising ex delicto are called "torts". § 813

The connection between the law of torts or delicts and criminal law. The Roman law of delicts included offenses which in modern law are regarded as crimes. And sometimes as a consequence a delict might be punished both by a civil and by a criminal action, as will subsequently be noticed. § 814

[1] ROMAN LAW: Gaius, 4, 2; *Inst.* 4, 6, 1; Gaius, 3, 182; *Inst.* 4, 1, pr. If several persons jointly committed a delict, any one of them was liable for all the damages without redress against his fellow tortfeasors: *Dig.* 4, 2, 14, § 15; *Code*, 4, 8, 1; *Dig.* 9, 2, 11, § 2; *Dig.* 26, 7, 55, § 1; *Dig.* 47, 10, 34. MODERN LAW: Cooley, *Torts*[2], pp. 3, note 1, 22; Robinson, *Elementary law*[2], § 196; *Civil code* of Austria, 1295, 1301; France, 1382; Germany, 823; Italy, 1151; Spain, 1902; Porto Rico, 1803; Argentina, 1100–7; Chile, 2314; Quebec, 1053; Japan, 709; Louisiana, 2315.

[2] ROMAN LAW: *Inst.* 4, 12, 1; Gaius 4, 112–3; see supra § 728. MODERN LAW: Williams, *Inst. of Justinian illustrated by English law*[2], pp. 302–3.

[3] "Nemo ex suo delicto meliorem suam conditionem facere potest": *Dig.* 50, 17, 134, § 1; Phillimore, *Legal maxims*, p. 224.

Historically, the root of the law of private wrongs or delicts lies in the idea of revenge, — enabling the injured party to derive satisfaction through a court of justice. This is why theft, robbery, and other delicts — now regarded as crimes punishable by the State — were in Roman law considered also private wrongs to be personally satisfied.

The distinction between a crime and a tort is not always easily discernible in modern law. For instance the English law finds difficulty in distinguishing a crime from a tort, — it is largely in the way the wrong is redressed: if by the State it is a crime, if by the private individual a tort.[4] Moreover, in English law, as in Roman, wrongs essentially public are frequently private wrongs also — that is, the same offense is both a tort and a crime, and the offender may be subject to a double liability. These cases occur where the private injury is of a pecuniary nature and different from that inflicted or suffered by the public at large: a good example is assault.[5]

§ 815 **Requisites of a tort or delict: (1) the act must be voluntary.** In both Roman and modern law, not every act is a tort or delict simply because it is injurious. To make the offender culpable three requisities must be present: the act must be voluntary; the act must not be done in the exercise of a legal right; the offended party must have suffered loss or damage. An act becomes tortious or delictal when it is done either with an intent to inflict injury or with culpable negligence.[6]

§ 816 **Requisites of a tort or delict: (2) the act must not be done in the exercise of a legal right.** A person is not liable for any damage resulting from an act which it was lawful for him to do. "No one commits a wrong, unless he did that which he has no legal right to do," [7] is the Roman jurist Paulus' maxim. In English law this Roman rule is better known as *damnum sine* or *absque injuria* (damage without the violation of a legal

[4] Cooley, *Torts*[2], p. 96.

[5] Cooley, *Torts*[2], pp. 8, 94–106.

[6] Negligence as a tort or delict is treated infra § 874. Performance of an obligation as affected by negligence is treated supra § 732.

[7] "Nemo damnum facit, nisi qui id fecit, quod facere jus non habet": *Dig.* 50, 17, 151.

right), and it is not actionable — it does not make the offender liable ex delicto.[8]

A purely accidental occurrence causing damage without any negligence on the part of the offender does not make him liable ex delicto.[9] For "a wrongful act (*injuria*)," says the Roman jurist Ulpian, "is any act violating a legal right."[10]

§ 817 **Requisites of a tort or delict: (3) the offended party must have thereby suffered loss or damage.** The violation of a legal right must have actually occurred. Generally, damage or loss means that which is pecuniary or measurable in money.[11] And damages are not only compensatory, but also may be penal or punitive, sometimes called exemplary.

In both Roman and English law, *injuria sine damno* (violation of a legal right without damage — that is, actual damage) will found an action: the barest nominal damage will suffice.[12] The rule *de minimis non curat lex* does not apply to a positive invasion of a right, however trifling the injury.[13] Roman jurisprudence always found, if possible, a new method of remedy for a new injury: the functions of the praetor included not only the power to administer the law, but also to *complete* or even to *correct* the positive law.[14] English law has been and is similarly progressive, as is seen from its maxim "where there is a right, there is also a remedy."[15]

§ 818 **The Roman noxal action or noxal surrender (noxae deditio).** According to the Roman law, if a slave or animal caused loss or damage to a person and its owner did not wish to pay for the injury, the owner could be compelled to surrender the slave or animal to the injured party.[16] And also in the ante-

[8] Cooley, *Torts*[2], p. 93; Williams, *Inst. of Justinian*[2], p. 246; Broom, *Legal maxims*, p. 151.

[9] *Inst.* 4, 3, 3; Williams, *Inst. of Justinian*[2], p. 261.

[10] "Injuria est omne, quod non jure fit": *Dig.* 47, 10, 1, pr.; "quod . . . est contra jus": *Dig.* 9, 2, 5, § 1.

[11] As to measure of damages for breach of contract, see supra § 733.

[12] Williams, *Inst. of Justinian*[2], pp. 247, 261; Cooley, *Torts*[2], p. 68; *Ashby* v. *White*, 2 Lord Raymond's Reports, 938, 955.

[13] Cooley, *Torts*[2], p. 69.

[14] See supra vol. i, §§ 41, 43–4, 50, 60.

[15] "Ubi jus, ibi remedium": Broom, *Legal maxims*, p. 146.

[16] *Inst.* 4, 8, pr.; Gaius, 4, 75; *Inst.* 4, 9.

Justinian Roman law the head of a family (paterfamilias) had the same option as to the delicts of his descendants in power, — either to pay damages or to surrender the offender.[17] This noxal surrender or noxal action applied to all delicts in Roman law. The master on being condemned, had the option either of paying the damages awarded or of surrendering the slave[18] in satisfaction of the injury.[19]

§ 819 **Classification of torts or delicts.** In Roman law, delicts were divided into wrongs against the person and wrongs against property. This classification is employed also in the modern Civil Code of Argentina.[20]

[17] *Inst.* 4, 8, 7; Gaius, 4, 75–81. As to persons in power, see supra §§ 446, 508–9.

[18] Or also the descendant in power, in the ante-Justinian law.

[19] *Inst.* 4, 8, pr.; *Inst.* 4, 9, pr.

[20] Book ii, section ii, title viii, chap. ii ("de los delitos contra las personas"), chap. iii ("de los delitos contra la proprietad").

CHAPTER II

WRONGS AGAINST THE PERSON

1. INJURIA

Injury to the person (injuria) defined. In the Roman category of wrongs against the person there was but one delict, namely injury to the person (injuria). As this word signifies, it is a violation of any legal right (jus) that a man[1] has as to his own person. The Roman conception of injuria was very comprehensive: it included a variety of tortious acts, such as assault,[2] libel and slander,[3] reviling a man in public,[4] entering a man's house against his will even to serve a summons,[5] attempt to violate chastity.[6] § 820

In the Justinian Roman law the injured party was allowed to measure the damages suffered.[7] But this estimate could be diminished by the court of justice[8]; and furthermore the judge in estimating the damages could take into account any indirect damage or loss caused by the injury, as is seen from the Institutes of Justinian which hold that "in the case of anything thrown or poured out (from a person's house whereby another is injured) . . . the judge . . . should include medical and other expenses of the injured person's

[1] *Free* man, of course in Roman law; see supra §§ 433–4.

[2] *Inst.* 4, 4, 1.

[3] *Id.* The truth was a good defense to libel or slander: *Dig.* 47, 10, 18, § 4; *Code*, 9, 35, 10.

[4] *Inst.* 4, 4, 1.

[5] *Dig.* 47, 10, frag. 23; see also frag. 15, § 5. The summons was the inauguration of a lawsuit; it was a notice to appear in court, which was served on the defendant.

[6] *Inst.* 4, 4, 1.

[7] *Inst.* 4, 4, 7. See Gaius, 3, 223. The usual action available against the wrongdoer was the *actio injuriarum.*

[8] *Inst.* 4, 4, 7.

illness, and also the loss occasioned from being unable to work." [9]

§ 821 **Self-defense.** Both Roman and modern law do not treat an assault as tortious if committed in self-defense.[10] A man can take life with impunity, if necessary to save his own life.[11]

§ 822 **Injuria sometimes also a crime.** When the violation of a personal right was grave or aggravated (*injuria atrox*, — atrocious injury), the offender was liable to a criminal prosecution.[12] False imprisonment, libel, offenses against chastity, atrocious assault, and abortion were always treated as crimes in Roman law.[13]

§ 823 **Survival of injuria in modern law.** From the side of tort there are many English Common Law torts against the person — such as assault and battery, libel, slander, false imprisonment, malicious prosecution — which contain some of the principles of the Roman injury to the person. From the side of crime the English Common Law offenses of rape, seduction, forcible entry and detainer, criminal assault, criminal libel, and abortion contain principles of the Roman injuria.

[9] *Inst.* 4, 5, 1.

[10] ROMAN LAW: *Dig.* 43, 16, 3, §§ 3, 7 and 9; *Dig.* 1, 1, 3; *Dig.* 4, 2, 12, 1; Hunter, *Roman law*[4], p. 151. MODERN LAW (Anglo-American): Cooley, *Torts*[2], pp. 45, 52.

[11] ROMAN LAW: *Inst.* 4, 3, 2; *Dig.* 9, 2, 4. MODERN LAW (Anglo-American): Clark, *Criminal law*, pp. 213, 149, et seq.

[12] *Inst.* 4, 4, 10; Hunter, *Roman law*[4], pp. 1069, 147.

[13] False imprisonment, etc: *Dig.* 48, 6, 5; *Dig.* 48, 15, 6, § 2; *Dig.* 48, 15, 7; *Code*, 9, 20, 7. Libel: *Code*, 9, 36, 2 (1); Paulus, *Sent.* 5, 4, 15. Offenses against chastity: *Dig.* 48, 11, 1–2; Paulus, *Sent.* 5, 4, 21; *Dig.* 48, 6, 3, § 4; *Code*, 9, 13, 1. Atrocious assault: *Dig.* 48, 6, 10, § 1; *Dig.* 48, 7, 2; *Dig.* 47, 10, 35 and 45. Abortion: Paulus, *Sent.* 5, 23, 14. On all these subjects see also Hunter, *Roman law*[4], pp. 1069–70.

CHAPTER III

WRONGS AGAINST PROPERTY

1. FURTUM

Theft (furtum) defined. The basic Roman conception of furtum was, as the word signifies, theft or stealing.[1] But furtum was not limited to stealing: the Roman conception of furtum became extended so as to include all "fraudulent taking of the property of another for the sake of gain."[2] § 824

That the scope of furtum was very extensive is revealed in the following passage from Justinian's Institutes: "A theft (furtum) occurs not only when any one carries away the property of another with the intention of appropriating it, but also when any one deals with the property of another against the will of the owner. Thus, if a pledgee or depositary makes use of the pledge or deposit, or if any one to whom a thing was lent for use makes a different use than that for which it was lent, he commits theft. For instance if any one borrows silver plate on the representation that he is going to

[1] Gaius, 3, 183–94; *Inst.* 4, 1, §§ 3–5.

[2] "Furtem est contrectatio rei fraudulosa lucri faciendi gratia": *Dig.* 47, 2, 1, § 3; *Inst.* 4, 1, 1. The civil remedy of the injured party against the thief was the *actio furti.* This was an action to recover damages; it was for fourfold damages or quadruple the loss, if the thief was caught in the act (*furtum manifestum*), and it was for twofold damages or double the loss, if the thief was not caught in the act (*furtum nec manifestum*): Gaius, 3, 189–90; *Inst.* 4, 1, §§ 5 and 19. See Gaius, 3, 184–5; *Inst.* 4, 1, 3. For the recovery of the stolen thing itself the owner could bring a *vindicatio* or *actio ad exhibendum*, if the stolen property was in the hands of a person innocent of the theft: *Inst.* 4, 1, 19; *Dig.* 13, 1, 7, § 1. But the remedy against the thief or his heirs for the recovery of the stolen property was the *condictio furtiva: Inst.* 4, 1, 19. There were also certain ante-Justinian actions — obsolete in the time of Justinian — for the recovery of stolen property: these were the *actio concepti* (Gaius, 3, 186; *Inst.* 4, 1, 4); the *actio oblati* (Gaius, 3, 187, *Inst.* 4, 1, 4); the *actio prohibiti furti* (Gaius, 3, 188, 192–3, *Inst.* 4, 1, 4); and the *actio furti non exhibiti* (*Inst.* 4, 1, 4).

give a supper to his friends, and then carries it far away with him; or if any one borrows a horse for a drive, and then takes it far away with him, or, as the old writers say, takes it into battle."[3]

Consequently in Roman law there were three kinds of theft (furtum): theft of a thing, theft of the use of a thing, and theft of the possession of a thing.[4] The two essential elements of furtum were: a wrongful intent and an actual appropriation.

§ 825 **Furtum also a crime. Survival of theft (furtum) in modern law.** Not only was the thief or offender liable civilly[5] to the injured party, but in serious cases of furtum he was also liable to a criminal prosecution.[6]

Nearly all of the principal rules of the law of theft have survived in modern criminal law — theft being treated as a crime, known in Anglo-American law as larceny. But the English tort action of trover for conversion contains many of the principles of the Roman furtum.[7]

2. RAPINA

§ 826 **Robbery (rapina) defined.** The Roman law of furtum and rapina was quite similar, for robbery was theft accompanied by violence.[8] The Roman passion for peace and order in society is revealed in its provisions as to the forcible seizure of property: it was made unlawful for any one to forcibly carry off any movable property or to make forcible entries on lands and houses, even if he believed that the property

[3] *Inst.* 4, 1, 6; Gaius, 3, 195–6.

[4] "Vel ipsius rei vel etiam usus ejus possessionisve": *Dig.* 47, 2, 1, § 3; *Inst.* 4, 1, 1.

[5] See supra § 824, second footnote, for an account of civil actions available against a person committing furtum.

[6] *Dig.* 47, 2, 93 (92); Hunter, *Roman law* [4], p. 1070.

[7] See Cooley, *Torts* [2], p. 516; *State* v. *Ross*, 104 Pac. Rep. 603.

[8] Gaius, 3, 209; *Inst.* 4, 2, pr. The delictal remedy against the 'robber' was the *actio vi bonorum raptorum*; this was for fourfold damages or quadruple the loss, if brought within a year; after a year it was for simple damages or for the loss only: *Id.*

belonged to him[9]; and if any one disobeyed and forcibly seized property, he had to forfeit it if in reality the property belonged to him, and if it was not his, he not only had to restore it but also must pay its value in money.[10]

Rapina also a crime. Survival of robbery (rapina) in modern law. Not only was rapina punished civilly,[11] but it was also a crime.[12] Many of the rules of the law of robbery have survived in modern law, being found in criminal law. In English criminal law the offenses of robbery and burglary contain many of the principles of the Roman rapina. But to take forcible possession of lands is a tort in English as well as in Roman law.[13] § 827

3. DAMNUM INJURIA

Damage to property (damnum injuria) defined. The measure of damages as fixed by the lex Aquilia. Damnum injuria comprised all wilful or negligent injury to the property of another which actually diminished the value of the property and was measurable in money.[14] § 828

The Roman law relating to damage to property rests on the provisions of a statute known as the lex Aquilia, enacted through the efforts of Aquilius, tribune of the plebs about the year 287 B.C. This statute abrogated the earlier provisions of the Law of the XII Tables.[15] The lex Aquilia itself fixed the amount of damages recoverable by the owner or

[9] *Inst.* 4, 2, 1; *Dig.* 4, 2, 13; *Code*, 8, 4, 7 and 10.

[10] *Inst.* 4, 2, 1.

[11] See supra § 826, first footnote, for the civil remedy of the injured party against the robber.

[12] *Dig.* 48, 19, 28, § 10; *Dig.* 48, 6, frag. 11, frag. 3, § 6; Hunter, *Roman law*[4], p. 1070.

[13] Cooley, *Torts*[2], pp. 379–81.

[14] On this involved subject of *damnum injuria*, see *Inst.* 4, 3; Gaius, 3, 210–19; Hunter, *Roman law*[4], pp. 330–3. In addition to the *actio damni injuriae* and the *actio legis Aquiliae*, both of which were available against the offender, there were numerous other remedies, some being of a minor character: *Inst.* 4, 3, pr.; Gaius, 3, 210; Hunter, *Id*; supra § 818 (noxal action); infra last footnote of this § 828.

[15] See the provisions of Table viii, which pertain to damage to property, especially § 5. The XII Tables are considered supra vol. i, §§ 37–8.

(§ 828) possessor of the property damaged.[16] Although this law originally gave compensation only for direct injuries, the praetor extended the statute by analogy so as to cover also indirect injuries or damages.[17] No action would lie under the lex Aquilia unless the damage was done either intentionally or negligently.

The owner's compensation was ordinarily the actual value of the thing destroyed or damaged. But "by interpretation of the statute (lex Aquilia) . . . it has been settled," state the Institutes of Justinian, "that the estimate should include . . . also any other loss which indirectly falls upon the owner."[18] And Justinian gives the following instances: "if one of a pair of mules or one of four chariot horses . . . is killed, the estimate of damage should include not only what is killed but also the depreciation in the value of the other animals surviving."[19]

One feature of the lex Aquilia is especially noticeable: it granted an action in damages for the unlawful killing of a human being, — the slave of another man.[20] It was not until thirteen centuries after Justinian that English law gave an action to compensate for unlawful killing of a human being, — Lord Campbell's Act of 1846, which has subsequently been re-enacted in the United States.[21]

Wrongful ejectment of the possessor of land made the offender liable to an action at law.[22] Other injuries to immovable property were redressed by an action which compelled the offender to pay for the damage done.[23]

[16] See *Inst.* 4, 3, §§ 1–16.

[17] *Inst.* 4, 3, 10; Gaius, 3, 212.

[18] *Id.* It should be remembered that the owner of a slave or animal could, in the law of Justinian, free himself from all liability by surrendering it to the offended party: supra § 818.

[19] *Inst.* 4, 3, 10; Gaius, 3, 212.

[20] *Inst.* 4, 3, pr.; Gaius, 3, 210.

[21] 6 and 7 Victoria, ch. 96; Cooley, *Torts* [2], pp. 307–24.

[22] The interdict *de vi et vi armata:* see *Dig.* 43, 16. The name of the English Common Law action *vi et armis,* for trespass, is reminiscent of the name of the Roman action. Interdicts are treated infra § 850.

[23] The interdict *quod vi aut clam*: see *Dig.* 43, 24.

Damnum injuria sometimes also a crime. Survival of damage to property (damnum injuria) in modern law. § 829 Where a slave had been killed, the owner had his option either of suing the culprit for damages under the lex Aquilia or of causing him to be criminally prosecuted.[24] The delict of damnum injuria has survived in modern law under other names. The rules as to what constitute negligence are repeated in the English law of negligence. The English law of nuisance has a root in the Roman damnum injuria: Blackstone defines nuisance as anything done to the hurt or annoyance of the lands, tenements, and hereditaments of another.[25]

4. FRAUD (DOLUS, DOLUS MALUS, FRAUS)

Fraud defined. § 830 Roman law employed the term dolus in a very wide sense not easy to define: it meant whatever was done, or omitted to be done, contrary to good conscience.[26] In both Roman and modern law there are two forms of fraud: (1) representing something as a fact which the person making the representation knows to be false[27]; and (2) deliberately concealing a fact.[28]

In both Roman and modern jurisprudence when one person has deceived another, to his pecuniary loss or damage, the offender is liable in an action at law for compensation to the injured party.[29] Both Roman and English law include under fraud every kind of craft or guile intentionally employed for the purpose of deceiving or cheating another person.[30] Nevertheless, as the Roman jurist Ulpian says, "no one is

[24] *Inst.* 4, 3, 11; Gaius, 3, 213.

[25] *Comm.* vol. iii, p. 215.

[26] Hunter, *Introd. to Roman law* [6], p. 86.

[27] The so-called *suggestio falsi.*

[28] The so-called *suppressio veri.*

[29] ROMAN LAW: The Roman action was called *actio de dolo:* see *Dig.* 4, 3; *Dig.* 44, 4; *Code*, 2, 20; Sohm (Ledlie [3]), *Roman law*, pp. 423–4. Fraud is one of the two exceptions to the rule that the motive of a juristic act is immaterial: supra § 748. MODERN LAW (Anglo-American): Cooley, *Torts* [2], pp. 554 et seq.

[30] ROMAN LAW: *Dig.* 4, 3, 1, § 2; *Dig.* 50, 17, 79; *Dig.* 2, 14, 7, § 9. ENGLISH LAW: Broom, *Legal maxims*, p. 578.

responsible for honest advice: but where fraud and cunning have intervened, there is ground for an action of fraud." [31]

5. INTIMIDATION (METUS, VIS)

§831 **Intimidation defined.** The Roman jurist Ulpian thus defines intimidation which is caused by threats: "Intimidation is trepidation of mind due to some instant or future danger." [32] Intimidation is a state of compulsion often described as duress. In both Roman and modern jurisprudence the forcing of a person to do something under the influence of fear, to his pecuniary loss or damage, makes the offender liable in an action at law for compensation to the injured party.[33]

6. NEGLIGENCE (CULPA, NEGLIGENTIA)

§832 **Negligence defined. Negligence as affected by contributory negligence.** In both Roman and modern law, negligence consists in the manifestation of either carelessness or unskillfulness.[34] Omission to use skill where a person holds himself out to be an expert in his occupation was considered in Roman law as culpable negligence: "Want of skill is reckoned as negligence," is the Roman jurist Gaius' famous interpretation of negligence.[35] The rule of English law on this point

[31] *Dig.* 50, 17, 47; Phillimore, *Maxims*, p. 237.

[32] "Metus est instantis vel futuri periculi causa mentis trepidatio": *Dig.* 4, 2, 1.

[33] ROMAN LAW: Sohm (Ledlie [3]), *Roman law*, pp. 423–4. The Roman action was called *actio quod metus causa:* see *Dig.* 4, 2. Intimidation is one of the two exceptions to the rule that the motive of a juristic act is immaterial: supra §748. MODERN LAW (Anglo-American): Cooley, *Torts* [2], pp. 592–3.

[34] ROMAN LAW: *Inst.* 4, 3, 6; and the next footnote. The usual remedy for negligence was an *actio utilis legis Aquiliae:* see *Dig.* 9, 2, 13, pr.; *Dig.* 17, 2, 52, §16. MODERN LAW (Anglo-American): Cooley, *Torts* [2], pp. 752, 791. Performance of an obligation as affected by negligence is discussed supra §756.

[35] "Imperitia culpae adnumeratur": *Dig.* 50, 17, 132. "Infirmitas culpae adnumeretur": *Dig.* 9, 2, 8, §1.

is similar to the Roman.[36] Under culpable negligence is (§ 832)
comprehended any willful wrong or intentional injury.[37]

But, in both Roman and modern law, liability for negligence may be offset by contributory negligence on the part of the injured party.[38] As the Roman jurist Pomponius says, "no one is injured by what he suffers through his own fault."[39] The chief difference between the Roman and the English law of contributory negligence is that the latter has worked it out with greater refinement.[40]

[36] Williams, *Inst. of Justinian* [2], pp. 227–8.

[37] ROMAN LAW: see Gaius, 3, 211; supra § 815. MODERN LAW (Anglo-American): Black, *Law dict.*[2], "willful negligence," p. 811.

[38] ROMAN LAW: Dig. 50, 17, 203; *Dig.* 9, 2, 9, § 4; *Inst.* 4, 3, § 5; Hunter, *Roman law* [4], pp. 246–7. MODERN LAW (Anglo-American): Black, *Law dict.*[2], "contributory negligence," p. 810; Williams, *Inst. of Justinian* [2], p. 228; Cooley, *Torts* [2], pp. 807–10.

[39] "Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire": *Dig.* 50, 17, 203.

[40] Williams, *Inst. of Justinian* [2], p. 229.

TITLE V

QUASI DELICTS

Quasi delicts defined. In both Roman and modern jurisprudence, quasi delicts are but extensions of the law of torts or delicts to duties similar to obligations arising ex delicto. And a quasi delict produces the same effect as a delict, — namely making the offender liable in an action at law to give pecuniary satisfaction for the loss or damage suffered by the injured party.[41] § 833

The English tort includes quasi delicts.[42] The Roman characterization of these obligations as arising "quasi ex delicto" has survived in the French "quasi-délits" and the Italian "quasi-delitti."

The Roman quasi delicts, including the liability of carriers and of innkeepers for the damage to or the loss of goods received by them. The Roman quasi delictal obligations included the following. 1. The liability of a court-referee or of a municipal magistrate who made an unjust or partial decision.[43] Although in English law a judge is not liable for § 834

[41] ROMAN LAW: *Inst.* 4, 5 "de obligationibus . . . quasi ex delicto," pr. MODERN LAW: Williams, *Inst. of Justinian illustrated by English law*[2], p. 246; *Civil code* of Chile, 2314; France, 1382; Germany, see 836; Italy, 1151; Japan, see 717; Louisiana, 2292, 2315; Spain, 1902, 1907; Porto Rico, 1803, 1808; Quebec, 1053.

[42] Williams, *Inst. of Justinian*[2], p. 246; Black, *Law dict.*[2], "quasi tort", p. 1161.

[43] *Inst.* 4, 5, pr. ("si judex litem suam fecerit"); *Dig.* 44, 7, 5, § 4; *Dig.* 5, 1, frag. 15, § 1, frag. 16; *Dig.* 9, 2, 29, § 7 ("magistratus municipales"). The injured party brought an action for damages. The court-referee (*judex*) was — prior to Diocletian, especially during the Early Empire — a person appointed by the praetor or other court to hear the evidence in a lawsuit and to report his decision to the court appointing him. If the court-referee (judex) decided contrary to a law read before him, he was punished with banishment to an island: Paulus, *Sent.* 5, 25, 4. In the Later Imperial and the Justinian law, *judex* usually meant a subordinate, petty, or inferior judge (*judex pedaneus*): Hunter, *Roman law*[4], pp. 73–4.

(§834) a judicial act,[44] yet if he acts without jurisdiction because he mistook the law he may be liable to a private action.[45]

2. The liability of a person from whose residence something was thrown out or poured to the injury of a passer-by.[46]

3. The liability of a person who kept something suspended over a public highway, which fell and injured somebody.[47]

4. The liability of carriers by water,[48] of innkeepers,[49] and of stable-keepers[50] for willful damage or theft committed in their ships, inns, or stables by some one of their employees, which delict caused damage or loss to the movable property received by them.[51] The liability of a common carrier is firmly established in Anglo-American law.[52] It was introduced into the English Common Law in the 17th century, during the reign of Charles II, in the celebrated case of *Mors*

If a judge failed to award costs to a successful litigant, as properly assessed by him, the judge had to pay them himself: *Code*, 3, 1, 13, § 6 (Justinian).

[44] The Roman law was the same as to a superior judge ("qui jure publico utitur"): *Dig.* 47, 10, 13, § 1. As to English law, see Williams, *Inst. of Justinian* [2], p. 265; Cooley, *Torts* [2], pp. 472 et seq.

[45] Williams, *Id.* (England).

[46] *Inst.* 4, 5, §§ 1–2; *Dig.* 44, 7, 5, § 5.

[47] *Id.*

[48] "Nautae" (*Dig.* 47, 5) or "exercitores" (*Inst.* 4, 5, 3) meant either ship-owners or characterers: see supra § 804. Although some of them probably were only private carriers (who transport but occasionally, and do not make transportation their vocation), the great majority of persons engaged in transportation by water were undoubtedly **common carriers** (who make the transportation of goods for hire their regular business). In the Roman world the usual means of transportation were ships, transportation by land being comparatively insignificant.

[49] "Caupones" (*Dig.* 47, 5).

[50] "Stabularii" (*Dig.* 47, 5).

[51] *Inst.* 4, 5, 3; *Dig.* 44, 7, 5, § 6. The owner of the property stolen or damaged could recover twice its value: *Dig.* 4, 9, 7, § 1; *Dig.* 47, 5, § 2. This liability of carriers and of innkeepers originated early in Roman law, being introduced by the praetor's edict: "Ait praetor: 'nautae caupones stabularii quod cujusque salvum fore receperint nisi restituent, in eos judicium dabo' " (*Dig.* 4, 9, 1, pr.). These classes of persons were thus bound quasi ex dilicto. As to the praetor's edict, see supra vol. i, §§ 41, 50, 60–61.

[52] Williams, *Inst. of Justinian* [2], pp. 215, 267; Cooley, *Torts* [2], p. 763. But liability may be limited by statute, — for the transportation of valuable articles the carrier may require notice of their value.

v. *Slew*,[53] as Lord Holt in the year 1703 mentions in the more famous case of *Coggs* v. *Bernard*.[54] According to the Common Law of England and the United States, an innkeeper is liable for the loss of his guest's goods received by him as innkeeper.[55] (§ 834)

[53] L. Raymond's Rep., 220.

[54] Lord Raymond's Rep., 909; 1 Smith, *Leading Cases*, 82. But there are authorities who deny that the English rule as to common carriers was borrowed from Roman law: see *Nugent* v. *Smith*, 1 Com. Pleas Div., 423 (opinion by Chief Justice Cockburn); Holmes, *Common Law*, pp. 180 et seq. (Mr. Justice Holmes ascribes its origin to Teutonic principles of bailment).

[55] Williams, *Inst. of Justinian* [2], p. 267; Cooley, *Torts* [2], p. 758. But this liability has been considerably diminished by statute in England and in many of our American states.

BOOK V

CIVIL PROCEDURE

BOOK V

CIVIL PROCEDURE[1]

CHAPTER I

INTRODUCTION

The debt of modern law to Roman civil procedure. The § 835
wonderful Roman system of judicial redress was remembered with affection long after the Roman eagles had been forever put to flight in Western Europe by the overthrow of the Empire. The modern civilized world is civilized largely because it has recovered from the Roman law principles of judicial remedies by which justice between man and man is peacefully accomplished. For instance it is interesting to notice that Blackstone recognizes the Roman origin of that greatly cherished doctrine of the English Common Law concerning the *limitations* of the right to serve process, which are expressed in the familiar phrase "every man's house is his castle."[2]

The connection between substantial law and procedure. § 836
Historically, substantive law is but the creature of procedure. The law of procedure by decided cases reveals not only who shall be protected by law, but also the matters to which protection shall be granted. These revelations make up the foundations of substantive law.

From another point of view the employment of a judicial remedy is the gift by the State of a new right to replace an old right violated. In primitive society the State did not

[1] The law of civil procedure forms a part of the Justinian codification of Roman law. But for purposes of convenience the Napoleonic codification placed the subject of civil procedure into a separate code, thus making the French Civil Code purely a code of substantive law. And this French expedient has been adopted in the later Modern Codes, including the Belgian, Dutch, Italian, Quebec, Spanish, Latin-American, Japanese, and German Moreover many of the English Common Law states of the United States, such as New York, have codified their law of procedure and practice, which compilations also are known as codes of civil procedure.

[2] Blackstone, *Comm.* vol. iii, p. 288; Cooley, *Torts*[2], pp. 368–9. The Roman law on this subject is contained in *Dig.* 2, 4, 18–21.

interfere in private quarrels: the injured party was free to indulge his revenge as he was able. But this meant constant violence and disturbance in a community. The Romans, if they venerated anything, worshiped law and order. Consequently a system of judicial remedies was early devised at Rome to take the place of private redress. The unauthorized taking of the law into one's own hands became vigorously repressed: in the reign of Marcus Aurelius a person who indulged in such self-help without the aid of the courts was severely punished.[3] And such was true also during the Later Empire and in the time of Justinian.[4]

But Roman law, like modern law, specifically provided for a submission to arbitration (*receptio arbitri*) or the settlement of disputes out of court by a disinterested party, which is a special form of contract.[5]

§ 837 **Judicial authority of the Roman praetor.** The powers of the praetor, the chief judicial magistrate of the Republic and for awhile of the Early Empire, were vast.[6] Not only could he grant an action (*dare*); but he could also declare what the law is — which power of interpretation he employed in his edicts (*edicere*) to administer, complete, or finally even to correct the existing law itself. Moreover, the praetor could award the title to disputed property to one of the litigants (*addicere*).[7] Lastly, the praetor had authority (*imperium*) to enforce all his decrees or orders. Other magistrates had similar powers, but not so ample as those of the praetor.

§ 838 **Action defined.** In both Roman and modern law the term "action" has two well defined uses. 1. An action means the right to sue at law on a claim of debt or a right of ownership: this is also known as the *cause* or *right* of action.[8] It is in this sense that the Institutes of Justinian define an action to

[3] *Dig.* 4, 2, 13.

[4] *Code*, 8, 4, const. 4, 7, and 10; *Inst.* 4, 2, 1; supra § 826. But the right of *self-defense* was recognized in Roman law: see supra § 821.

[5] See supra § 740.

[6] See supra vol. i, § 60.

[7] See supra § 644.

[8] The two terms are synonymous in American law: *Graham* v. *Scripture*, 26 How. Prac. (N. Y.), 501.

be "the right of suing in court for what is due." [9] Blackstone declares that the meaning of action in English law is "as Bracton and Fleta express it in the words of Justinian." [10]

2. The word action means the procedure to which recourse is had to enforce a right in a court of justice. The person making the claim is called the plaintiff (*actor*, in Roman law); and the opposing party is called the defendant (*reus*, in Roman law).

Classification of actions. The principal Roman division of actions is into real, personal, and mixed.[11] A *real* action, or an action "in rem", was one founded on a right of ownership.[12] A *personal* action, or an action "in personam", was one founded on an obligation.[13] A mixed action was a combination, "mixta", of the other two kinds of actions.[14] This Roman classification has descended into the English Common Law: Blackstone, following Bracton, adopts the Roman division of actions into real, personal, and mixed.[15] The law of Louisiana also maintains this same Roman classification,[16] and restates the Roman conception of a mixed action as follows: "A mixed action is one which in its nature partakes both of the real and the personal action, such as a claim for the ownership of real property, and also for the fruits it has produced, or their value." § 839

Another important Roman classification of actions was their division, according to origin, into civil and praetorian.[17] *Civil* actions were those founded on some statute, Republican

[9] "Actio autem nihil aliud est, quam jus presequendi judicio quod sibi debetur": *Inst.* 4, 6, pr. This definition is taken from Celsus, — *Dig.* 44, 7, 51.

[10] *Comm.* vol. iii, p. 116. These early English jurists are discussed supra vol. i, §§ 374, 375.

[11] Gaius, 4, 2–3; *Inst.* 4, 6, 1; *Dig.* 44, 7, 25.

[12] An action *in rem* was technically called a "vindicatio": see *Inst.* 4, 6, 15.

[13] An action *in personam* was also called a "condictio": see *Inst.* 4, 6, 15.

[14] *Inst.* 4, 6, 20; *Dig.* 44, 7, 37, § 1.

[15] *Comm.* vol. iii, p. 116.

[16] *Code of practice*, 3–7, 26 et seq.

[17] *Inst.* 4, 6, 3.

(§839) or Imperial[18]; in this class were included all actions furnished by the old law for citizens (jus civile[19]). *Praetorian* actions were those originally introduced into Roman law by the praetorian edicts.[20]

Another Roman classification of actions was their division into actions for obtaining something (*actiones rei persequendae causa*) and actions for obtaining a penalty (*actiones poenae persequendae causa*).[21] The former always arose *ex contractu*, the latter *ex delicto*.[22]

In the Later Republican and Early Imperial system of civil procedure[23] great importance was attached to the distinction between actions *stricti juris* and actions *bonae fidei*.[24] In actions *stricti juris*[25] there was no opportunity for the introduction of anything collateral to the main issue; the powers of the trial judge (judex)[26] were strictly limited and did not give him any latitude to consider equitable defenses, such as fraud or intimidation, or even to take into account any set-off.[27] In actions *bonae fidei*[28] there was ample opportunity for the introduction of equitable defenses and set-off.

Although the distinction between actions *stricti juris* and actions *bonae fidei* lost its importance in the Later Imperial system of procedure,[29] yet it continued to exist in the time of Justinian — the principle still remained that in an action

[18] *Id.*

[19] See supra vol. i, §§ 40, 56, 111, 114, 115.

[20] *Inst.* 4, 6, 3. See supra vol. i, §§ 41, 50, 56, 60–61, 112.

[21] *Inst.* 4, 6, 17–18; Gaius, 4, 7–8.

[22] *Id.* Contracts and torts are defined supra §§ 746, 813.

[23] The formulary procedure, — treated infra §§ 846–9.

[24] *Inst.* 4, 6, 28; Gaius, 4, 61–3. Only actions *in personam* were subject to this classification; but Justinian made one action *in rem* (the *hereditatis petitio*) an action *bonae fidei: Inst.* 4, 6, 28; *Code*, 3, 31, 12, § 3.

[25] Examples of these actions were: actions *ex delicto* and *quasi ex delicto*, actions on verbal and literal contracts. Actions *stricti juris* were also known as *condictiones*.

[26] Treated infra § 849. Judex is best translated as "court-referee".

[27] See supra §§ 748 (fraud and intimidation), 741 (set-off).

[28] Examples of these actions were: the actions arising from sale, letting and hiring, partnership, and agency (*Inst.* 4, 6, 28).

[29] The extraordinary procedure, — treated infra § 851.

belonging to the class. *bonae fidei* the defendant could raise more defenses than in an action belonging to the class *stricti juris*. It is the opinion of an eminent authority that the English distinction between legal and equitable actions is due to the importation of the Roman difference between actions *stricti juris* and *bonae fidei*.[30]

In Roman law there were also certain actions *arbitrariae*, in which the judge had very large discretionary authority.[31] In the Later Republican and Early Imperial law, *actio directa* was a term sometimes given to an existing regular action, in order to distinguish it from an *actio utilis* or the praetor's equitable extension of the established action to fit cases not coming within its original scope[32]; but in the Later Imperial and Justinianean law this distinction had only a historical importance.[33] In the Later Republican and Early Imperial law, *actio in factum* was a term applied to any new action ex contractu granted by the praetor which was without any analogy in the existing law.[34]

The three successive systems of Roman civil procedure. § 840 Three successive systems of civil procedure existed in Roman law: the statute-actions, the formulary or ordinary procedure, and the extraordinary procedure. Of these the statute-actions began and flourished during the Republic; the formulary procedure, which began under the Republic, flourished during

[30] Spence, *Equity*, vol. i, pp. 218, 246. See also Williams, *Inst. of Justinian*[2], p. 279.

[31] *Inst.* 4, 6, 31.

[32] For instance all actions available to the heres (heir as recognized by the jus civile, supra § 671) were available as *actiones utiles* to the bonorum possessor (heir as recognized by the praetorian law, supra § 672). *Actiones utiles* included also *actiones fictitiae*, or actions modeled on direct actions with the assistance of a fiction (the above illustration as to the bonorum possessor is an instance of an *actio fictitia*).

[33] "Nec refert directa quis an utili actione agat vel conveniatur, quia in extraordinariis judiciis . . . haec suptilitas supervacua est": *Dig.* 3, 5, 46 (47), § 1.

[34] "Quorum appellationes nullae jure civile proditae sunt": *Dig.* 19, 5, 3. Such new actions were happily described as *actiones in factum praescriptis verbis* (the action was designated not by a short fixed term, but by several representative words which characterized the transaction leading to the lawsuit): for illustrations see *Dig.* 19, 5, frag. 13, § 1, frag. 22, frag. 24.

(§ 840) the Early Empire; and the extraordinary procedure was the procedure of the Later Empire and of Justinian.

The statute-actions and the formulary procedure had this one common characteristic[35]: after exercising jurisdiction and starting the litigation the court itself ordinarily never tried its cases, — matters in dispute were tried and decided by court-referees (judices) whose judgments the court enforced. But the extraordinary procedure abolished this distinction between court and referee: thereafter the court itself tried and decided all the matters disputed by the litigants.

[35] Known as the *ordo judiciorum*.

CHAPTER II

SYSTEMS OF CIVIL PROCEDURE DURING THE REPUBLIC

1. STATUTE-ACTIONS (LEGIS ACTIONES[1])

Statute-actions (legis actiones) defined and enumerated. § 841 The system of statute-actions began under the Early Republic, and was developed by the Law of the Twelve Tables.[2] The use of this system of procedure continued throughout the entire Republican era, although its supremacy was destroyed a few years before the birth of Cicero.[3]

The statute-actions consisted of a complicated ritualistic collection of formal acts; the procedure was very delicate, — any variation from the exact words and gestures prescribed by the statute (lex) was absolutely fatal to a litigant's success. The jurist Gaius gives an illustration of the nicety of the statute-actions: a person who sued for damages due to his vines having been cut down, lost his case because he used the term "vines" instead of "trees" — the word "trees" being employed in the Law of the Twelve Tables on which the right of action was founded.[4] There were five Roman statute-actions: actio sacramenti, judicis postulatio, condictio, manus injectio, and pignoris capio.[5]

Actio sacramenti. The principal legis actio was the actio § 842 sacramenti, a suit in which the good faith of the litigants was

[1] These Latin words are used in Gaius, 4, 11. They have been translated also as "procedure by statute" (Roby, *Roman private law*, vol. ii, p. 339); "statute-process" (Moyle, *Inst. of Justinian*, vol. i, 5th ed. p. 635; Poste, *Gaius*[4], p. 454); "antique civil processes" (Amos, *Roman law*, p. 343); "actions of the law" (Mackenzie, *Roman law*[7], p. 360). See also Hunter's interpretation of the scope of legis actiones: *Roman law*[4], p. 974.

[2] 450–449 B. C.: supra vol. i, § 37.

[3] About the year 130 B. C.: see infra § 845.

[4] Gaius, 4, 11.

[5] All these are described by Gaius, 4, 11–31.

secured by each one depositing a sum of money with the college of priests (*pontifices*) on condition that the losing party should forfeit his stake (*sacramentum*) to the State for the benefit of public worship (*ad sacra publica*).[6] This action was applicable in most cases, and was both real and personal.[7]

§ 843 **Judicis postulatio, and condictio.** The distinctive feature of the less common *judicis postulatio*, as to which we know but little,[8] was a request for the immediate appointment of a court-referee (*judex*).[9]

Condictio seems to have been a further development of proceedings *ex lege*. It was a simple summons into court (*vocatio in jus*), followed by a further appearance of the parties before the praetor 30 days later for the purpose of having a court-referee (*judex*) appointed.[10] *Judicis postulatio* and *condictio* virtually anticipated the next system of Roman procedure — the formulary — which was based on this reference of cases to a judex for trial.

§ 844 **Manus injectio, and pignoris capio.** These two *legis actiones* were not strictly actions, but modes of executing judgments. By *manus injectio* a judgment was executed by the creditor arresting the debtor and imprisoning him in the creditor's house; if the debtor failed to pay after 60 days, the creditor could sell him as a slave across the Tiber — that is, into a foreign land.[11] *Pignoris capio* was a creditor's distraint or seizure, in certain exceptional cases, of property belonging to his debtor.[12]

§ 845 **Abolition of the statute-actions (*legis actiones*).** The disadvantages of the statute-actions were numerous. In addition

[6] Gaius, 4, 13–6.

[7] Id. The distinction between the actions in rem and in personam is explained *supra* § 839.

[8] The part of Gaius' Institutes (4, 17a) describing this action is no longer in existence. See Hunter, *Roman law*[4], p. 978.

[9] Defined *infra* § 849.

[10] Gaius, 4, 18–20. This action was introduced about 204 B. C. by the *lex Silia*, and later the scope of *condictio* was extended by the *lex Calpurnia* (149 B. C.). See also *Inst.* 4, 6, 15.

[11] Gaius, 4, 21–5.

[12] Gaius, 4, 28–9, 32.

to their formal pedantry they were open to Roman citizens only, and were not available to foreigners. Moreover, a litigant could not ordinarily appear in a suit by an attorney; a litigant must *personally* perform all the ceremonies required in a legis actio.[13] For these reasons the statute-actions grew hateful and were ill adapted to a rising complex civilization.[14] And about the year 130 B.C. a law, the lex Aebutia, was enacted[15] which introduced a new system of procedure: thereafter by this law the use of statute-actions was made optional to litigants. Nearly a century later Augustus abolished, for ordinary litigation,[16] the ancient legis actiones.[17]

2. FORMULARY OR ORDINARY PROCEDURE[18]

Origin of the new formulary procedure. Its advantages. It became also the system of procedure of the Early Empire. Its influence on the Justinian and the modern law of civil procedure. The formulary procedure was originally a procedure for foreigners, modified and adapted from the statute-actions[19] by the praetor for foreigners (praetor peregrinus).[20] Finally, about the year 130 B.C., it was made available for § 846

[13] Gaius, 4, 82; *Inst.* 4, 10, pr.

[14] Gaius, 4, 30.

[15] The date of the lex Aebutia, which has been variously fixed, is now placed at about the year 130 B. C.: Sohm (Ledlie [3]), *Roman law*, p. 247, note 8. Earlier dates are given by older authorities: see Hunter, *Roman law* [4], p. 62.

[16] In the time of Gaius (died after c. A. D. 180) legis actiones were still employed in the archaic centumviral court (see infra § 889) and could be employed in the praetor's court for *damnum infectum* (as to which Gaius' language is significant, "nemo vult lege agere", — everybody prefers to use the action given by the edict of the praetor): Gaius, 4, 30–31.

[17] By the *lex Julia judiciaria* or *lex Julia judiciorum privatorum* (46 B. C.).

[18] "Per formulas litigare": Gaius, 4, 30. "Ordinaria judicia": *Inst.* 3, 12, pr. This system of procedure is also described as the "formular system" (Muirhead, *Roman law* [2], p. 334); "formula system" (Kelke, *Roman law*, p. 226). See also supra § 840.

[19] Defined supra § 841.

[20] See supra vol. i, §§ 43–4. Peregrini meant only not aliens, but also the great class of non-citizens or Roman subjects: see § 58.

(§846) Roman citizens in their own court of the city praetor (praetor urbanus) by the lex Aebutia.[21]

The distinctive feature of the new system of procedure, as compared with the old statute-actions, was its freedom from sacramental and mysterious formality. Moreover, the new formulary procedure provided for representation of a party in court by his attorney, — an utter impossibility under the old system of statute-actions.

The new formulary procedure, which was inaugurated not long before the advent of the closing century of the Republic, outlived the Republic and became the system of procedure of the Empire for over 300 years until the reign of Diocletian. The formulary procedure gave birth to the celebrated era of Roman civil procedure. A highly developed system of *pleading* was created, which descended into the Justinian law and thence into all modern civil procedure.

The familiar allegations of the American law of pleading which are employed by the plaintiff and defendant until the issues of the case are reached and joined — such as the declaration or complaint, answer, pleas in confession and avoidance, rejoinders, surrejoinders, and other pleadings — were evolved for the first time in human history by the genius of Roman lawyers and judges.

[21] Supra § 845. As to the praetor urbanus, see supra vol. i. § 40.

CHAPTER III

SYSTEMS OF CIVIL PROCEDURE DURING THE EMPIRE

1. THE FORMULARY OR ORDINARY PROCEDURE OF THE EARLY EMPIRE PRIOR TO DIOCLETIAN

Basis of the formulary procedure. Outline of a lawsuit in the era of the formulary procedure. Formula and litis contestatio defied. § 847 For the first three centuries of the Empire the system of procedure was the formulary, which — starting late under the Republic — attained to full fruition in the early centuries of the Empire. The basis of the formularly procedure was the *ordo judiciorum* or the division of the task of adjudication between the magistrate and the court-referee (judex).

First, the praetor or magistrate decided by a preliminary hearing of the parties whether there was *prima facie* good ground for granting an action; if he decided affirmatively, he then organized the suit by making a formula, which was a short written decree appointing a court-referee (judex) and briefly stating the cause of action and also the issues of fact to be tried; this formula the magistrate then gave to the plaintiff in the presence of the defendant — which proceeding, inasmuch as it exhibited the defendant's acceptance[1] of the formula just given to the plaintiff, constituted the litigant parties' joinder of issue (litis contestatio[2]).

The case then went to trial before the referee. Sometimes more than one referee were appointed by the magistrate.[3] The judex, in trying the case, was bound by the

[1] The formula must satisfy also the defendant by containing all defenses he might have against the plaintiff: see infra § 848.

[2] See Gaius 3, 180.

[3] See infra § 849.

formula: he could not depart from the limits of the written instructions given to him by the magistrate.[4] After the referee had tried the case and rendered judgment (*sententia*), the court was then asked to enforce it: this the magistrate did by issuing a decree (*decretum*) executing the judgment.

§848 **The principal parts of a formula: demonstratio, intentio, condemnatio, and — occasionally — adjudicatio. The accessory parts of a formula: exceptio and praescriptio.** Frequently the plaintiff was able to find already published in the edict of the praetor a formula appropriate to his case: but when there was none which fitted his case, the praetor himself had power to draw up a new formula.[5] The first part of the formula was the "demonstratio", which consisted of the statement of facts and the cause of action.[6]

This was followed by the "intentio", which was the second part of the formula and contained a statement of the plaintiff's claim.[7] In the "intentio" were placed whatever defenses the defendant had, which would operate to acquit him wholly or in part[8]: these were known as "exceptiones".[9]

The final part of the formula was ordinarily the "condemnatio", which empowered the court-referee (judex) either to condemn or to acquit the defendant.[10] But occasionally there was a fourth part to the formula: in the three actions

[4] For this reason Hunter describes the formula as " a reference to arbitration": *Roman law* [4], p. 974.

[5] See supra §837. When the formula stated the facts that would justify a decision or the amount of a decision in the plaintiff's favor, it was known as *formula in factum concepta;* when the formula expressly asserted the right of the plaintiff, it was known as *formula in jus concepta:* see Gaius, 4, 45–7.

[6] "Res de qua agitur": Gaius, 4, 40. But sometimes the *demonstratio* was included in the *intentio*, the next part of the formula: Gaius, 4, 47.

[7] Gaius, 4, 41. The *intentio* must always be present in any formula: Gaius, 4, 44.

[8] "Omnes autem exceptiones in contrarium quam adfirmat is cum quo agitur": Gaius, 4, 119.

[9] Gaius, 4, 115–29; *Dig.* 44, 1, 1–5; Girard, *Manuel de droit romain* [5], p. 1030.

[10] Gaius, 4, 43.

for the partition of property held in common it was necessary (§848) to add an "adjudicatio", which empowered the judex to make the partition.[11]

The jurist Gaius gives many illustrations of 'blank' formulas ready for use by prospective litigants. The following formula is one available against a person receiving a deposit,[12] the names and the deposit being fictitious: "Let ———— be judex. Whereas Aulus Agerius deposited a silver table in the hands of Numerius Negidius, which is the cause of action, whatsoever it be proved that Numerius Negidius ought by good faith to convey or do to Aulus Agerius, for this, judex, condemn Numerius Negidius, unless he make restitution; if it be not proved, pronounce his acquittal."

It sometimes happened that, prior to the commencement of the formula proper, there was a statement of certain particulars, either pleaded by the plaintiff to limit or define his cause of action, or pleaded by the defendant to serve as a defense: such preliminary allegations, because these came or were written first, received the very appropriate name of "praescriptiones".[13] These preliminary allegations the judex had to try first and decide[14] before proceeding to the main issue reached by the litigants.

There were many praescriptiones pleadable by either the plaintiff[15] or defendant[16]: among those available to the defendant was the very important *praescriptio temporis*, — setting forth extinction or acquisition of a right by lapse

[11] Adjudication is one of the modes of acquiring ownership: see supra § 644, the second footnote of which gives the names of these three Roman actions.

[12] Defined supra § 758. The illustrative formula is taken from Gaius, 4, 47.

[13] "Praescriptiones autem appellatas esse ab eo, quod ante formulas praescribunt": Gaius, 4, 132. See also Girard, *Manuel de droit romain* [5], p. 1029. The subject of praescriptiones is treated in Gaius, 4, 130–37.

[14] If the praescriptio was found to be true, the suit might be dismissed or suspended: Gaius, 4, 130–31.

[15] Gaius, 4, 130–1.

[16] Gaius, 4, 133.

of time.[17] Praescriptiones pleadable by the defendant were no longer employed in the time of the jurist Gaius: they had become merged in *exceptiones*. And this merger descended into the Justinian law.[18]

§ 849 **The court-referees (judices, arbitri, recuperatores).** The Republican and Early Imperial court-referees[19] were a body of private persons, originally the senators and later the knights,[20] a list of which was prepared and published in the praetor's album, and from which the parties litigant chose or the magistrate appointed one or more persons to try a case. In the time of Augustus there were 4000 persons who were eligible for judices.[21]

§ 850 **Extraordinary actions, the most important of which were the interdicts.** But in the formulary period of procedure there was a group of exceptional or extraordinary actions which the praetor or magistrate personally tried and did not refer to a court-referee for trial.[22] The earliest and most important of this special class of actions were the interdicts.[23]

[17] Praescriptio is one of the modes of acquiring ownership: supra § 645. Other well-known praescriptiones are mentioned in next to the last footnote of this § 645.

[18] See *Dig.* 5, 1, 52, 3; *Dig.* 31, 34, 4; *Dig.* 44, 2, 29; *Dig.* 46, 3, 91; *Dig.* 48, 16 (15), 7. Exceptiones in the law of Justinian are treated infra § 857.

[19] Although the usual word for referee was "judex", sometimes the words "arbiter" and "recuperator" were employed in Later Republican and Early Imperial Roman law. "Judex," as used in the formulary procedure, is not exactly translatable into English. And it has been translated variously: "judge" (used by Leage, *Roman law*, p. 369), is accurate only of the Later Imperial and Justinian judex who was a real or true judge; "arbitrator" (used by Hunter, *Introd. to Roman law* [6], p. 178), although fairly accurate, is confusing because of the well-settled ordinary meaning of this English word; "juror" is misleading, for the Roman civil judex "was a combination of arbitrator and juryman" (Adby and Walker, *Gaius* [3], p. 483); "referee" is Howe's excellent word (*Civil law* [2], p. 335); "judicia, referee" is Hunter's apt phrase in his great work (*Roman law* [4], p. 189). The court-referees, as a part of the Roman judicial organization, are discussed at length, infra § 881.

[20] *Equites:* see infra § 881.

[21] Infra § 881.

[22] "In extraordinariis judiciis, ubi conceptio formularum non observatur": *Dig.* 3, 5, 46 (47), § 1.

[23] See Gaius, 4, 138–70; *Inst.* 4, 15 "de interdictis"; *Dig.* 43, 1 et seq.; *Code*, 8, 1 et seq. There were other extraordinary actions of later develop-

These actions were of a summary nature, intended to preserve property or rights from the danger of immediate invasion.[24] (§ 850)

The Roman court, by personally deciding such litigation, was said to act out of the ordinary or in an extraordinary manner.[25] And this extraordinary method of proceeding, an exception to the regular ordinary procedure per formulam, was destined to give its name to the last system of Roman civil procedure — the extraordinary procedure of the Later Empire, which supplanted the old formulary procedure.

After Diocletian abolished the formulary procedure, interdicts lost their significance as a special class of actions and, as such, were no longer issued, being replaced by ordinary Later Imperial actions which served the same purpose.[26]

The Roman interdict procedure undoubtedly furnished the model for the Anglo-American *injunction*, which originated in the Court of Chancery[27]; in its summary nature and its instant protection of rights the English offspring closely resembles its Roman parent.

There is also a marked likeness between some features of the English *mandamus* and the Roman interdict.[28] There is also a close resemblance between th English Common Law *assize of novel disseisin* and the Roman interdict *unde vi:* Bracton, the father of the English Common Law,[29] identifies

ment in the Early Imperial law: actions concerning trusts (Gaius, 2, 278; *Inst.* 2, 23, 1; *Dig.* 50, 16, 178, § 2, see supra § 712), administrative suits brought by the State (*Dig.* 50, 13), and actions by lawyers to obtain payment of their fees (*Dig.* 50, 13, 1, § 10). For other minor extraordinary actions, see *Dig.* 25, 3, 5.

[24] Gaius, 4, 138–70; *Inst.* 4, 15; *Dig.* 43, 1 et seq.

[25] "Extra ordinem": *Inst.* 4, 15, 8.

[26] "De interdictis seu actionibus quae pro his exercentur": *Inst.* 4, 15, pr. "De interdictis seu extraordinariis actionibus": *Dig.* 43, 1. See also *Inst.* 4, 15, 8. But the Later Imperial actions (which were substituted for the old interdicts) were also tried in a summary rapid manner: *Code*, 8, 1, const. 3 and 4; *Code*, 8, 2, 3; *Code*, 8, 4, 8; *Code*, 11, 48 (47), 14; *Code* 7, 69.

[27] See Bispham, *Equity* [5], § 402.

[28] Williams, *Inst. of Justinian illustrated by English law* [2], pp. 318–19; Phillimore, *International law*, vol. 4, ch. 47.

[29] See supra vol. i, § 374.

this old English writ (now obsolete) with the Roman interdict just mentioned.[30]

2. THE EXTRAORDINARY PROCEDURE[31] OF THE LATER EMPIRE AND OF JUSTINIAN

§ 851 **Abolition of the formulary procedure by Diocletian in A.D. 294 and substitution of the extraordinary procedure. Basis of the extraordinary procedure.** With the decay of Republican manners, private persons became reluctant to accept the irksome task of court-referee (*judex*) in civil suits; and especially was this difficulty experienced in the Roman provinces. Furthermore, the formulary system of procedure, which dated to Republican times, was incompatible with the policy of Diocletian and Constantine to transform the government of the Empire into a highly centralized absolutism.[32]

In the year 294 Diocletian abolished[33] the centuries-old practice of dividing the task of adjudication between magistrate and judex,[34] and enacted that ordinarily the magistrates should personally try and decide all cases. A half century later even any rare exceptional employment of the formula disappeared: by a statute of the sons of Constantine the use of the formula was entirely prohibited.[35] Instead of the formula there was substituted a written complaint and summons which informed the defendant of the nature of the lawsuit brought against him.[36]

[30] 103b. The assize of novel disseisin may have originated from an ecclesiastical court. This ancient writ, the most commonly employed form of the old English possessory action, dates from late in the 12th century; it is first mentioned in a statute known as the Assize of Northampton, A.D. 1176: 3 Twiss, *Bracton*, Introduction.

[31] "Extraordinaria judicia": *Inst.* 3, 12, pr.; *Dig.* 3, 5, 46 (47), § 1.

[32] See supra vol. i, § 120.

[33] *Code*, 3, 3, 2–3. See supra vol. i, § 122.

[34] See supra § 847.

[35] *Code*, 2, 57 (58), 1, — A. D. 342. But the Republican and Early Imperial formal demand for an action (*impetratio actionis*), which was made upon the magistrate, continued to be employed for nearly a century later and did not cease until A. D. 428: *Code*, 2, 57 (58), 2.

[36] See infra §§ 853–4.

The extraordinary procedure, which had been sometimes employed in the old formulary procedure,[37] now became the regular system of procedure for all cases. This last system of Roman procedure is that which was current in Justinian's time[38]; it also survived him and continued to be the civil procedure of the Eastern Roman Empire down to its destruction by the Turks in the middle of the 15th century[39]; and it underlies all modern procedure. (§ 851)

The extraordinary procedure was the most liberal of all the Roman systems of procedure. Its basic conception was the union of the functions of magistrate and the trier of a case in one and the same person: in other words, cases were tried and decided by the magistrate himself.[40] This constituted the most important innovation of the Later Imperial and the Justinian system of procedure. A large part of the principles of the displaced formulary procedure were retained in the procedure of the Later Empire, including some of the conceptions, terms, and language of formulary pleading.[41]

[37] Supra § 850, including the second footnote.

[38] *Inst.* 4, 15, 8.

[39] See supra vol. i, § 183.

[40] This was just the reverse of the supplanted formulary procedure, which divided the task of adjudication between magistrate and court-referee: supra § 847.

[41] See infra §§ 856–7.

CHAPTER IV

PROCEEDINGS IN A CIVIL ACTION IN THE TIME OF JUSTINIAN

§ 852 **Introduction.** The proceedings in a civil action in the time of Justinian belong to the last system of Roman civil procedure, — the extraordinary.[1] As the elements of a civil process are examined, each topic, by its innate familiarity to a modern lawyer bears, silent witness to the great debt modern procedure owes to the Roman.

1. PROCEEDINGS BEFORE TRIAL

§ 853 **Commencement of a lawsuit: the plaintiff's libel or complaint.** Proceedings in a civil action began by the plaintiff filing with the proper court a complaint, called the libel (*libellus*,[2] *libellus conventionis*[3]), which in the time of Justinian was a written document containing a precise, sworn[4] statement of the plaintiff's demand and praying that the defendant should be summoned to appear in court.[5] The Roman name itself of the complaint—"libel"—has survived in the modern Anglo-American "libel", which is the initiatory pleading of our admiralty procedure.[6]

In Roman law the necessity of the oath to the libel was imposed for the purpose of discouraging vexatious or unjustifiable litigation.[7] And for the same reason the defendant

[1] Supra § 851.

[2] The term used in *Code*, 2, 2, 4; *Nov.* 53, 3.

[3] The term used in *Inst.* 4, 6, 24.

[4] *Inst.* 4, 16, 1.

[5] The libel should be signed by the plaintiff, or, if he could not write, by a notary for him. As to errors made in the libel by the advocates, see *Code*, 2, 9 (10).

[6] Benedict, *Admiralty*[3], § 372.

[7] *Inst.* 4, 16, 1; *Code*, 2, 58 (59). Vexatious litigation was punished also by infamy (defined supra § 453).

had to swear to his answer.[8] This feature of Roman civil procedure has survived in the American law of admiralty procedure, which requires that both the libel and the answer must be verified by oath, as Mr. Justice Ware held in the case of *Hutson* v. *Jordan*,[9] decided in 1837.

§ 854 **The summons or citation served on the defendant by an officer of the court.** Unless the Roman magistrate refused to entertain the plaintiff's libel, the next proceeding was the summons (*in jus vocatio*, *citatio*, *admonitio*, *commonitio*) of the defendant to appear in court, which was made by an officer of the court[10] who at the same time served upon the defendant a copy of the libel.

Thus had Roman jurisprudence developed the summons from the private arrest of the Republican and Early Imperial law (when the plaintiff personally sought the defendant and took him to court[11]) into the Later Imperial and Justinianean citation by public authority — by the State's authority. The Roman summons undoubtedly exercised much influence on the development of the English Common Law summons: the two are compared by Blackstone.[12]

In the time of Justinian although the plaintiff could fix in his libel the day for trial, he must allow the defendant an interval of at least 20 days.[13] And, after the defendant had been summoned, the plaintiff must proceed with his case within two months or pay a heavy penalty to the defendant.[14]

§ 855 **Representation of a litigant in court by an agent or attorney (procurator or advocatus). The giving of security by litigants.** Although a party to a lawsuit was at liberty to conduct

[8] *Id.* See also infra § 856, third footnote.

[9] 1 Ware (U. S. District Court Rep.), 385.

[10] Court-officers who were process-servers were called "exsecutores litium", "executores", and they were paid fees ("sportulae") for their services: *Inst.* 4, 6, 24; *Nov.* 112, 2. Such officers of court may have been known to Roman law as early as the reign of Diocletian, — at the end of the 3d century A. D.: see *Code*, 2, 2, 4.

[11] The ancient *vocatio in jus* is treated in the *XII Tables*, i, 1–3; Gaius, 4, 184–7.

[12] *Comm.* vol. iii, p. 279, vol. iv, p. 283.

[13] *Nov.* 53, 3, 1.

[14] *Nov.* 96, 1.

(§ 855) his case himself, yet, if he did not wish to do so, he could employ an agent or attorney to take charge of his case and conduct it for him. Security was required by the court from any litigant, plaintiff or defendant, who was represented in the lawsuit.[15] The giving of bail in English law is regarded by Blackstone[16] as an adaptation of the Roman giving of security by the parties.

The Roman agent known as *procurator* was not necessarily a lawyer.[17] Any person not under some disability[18] could be appointed by a litigant to act as a mere agent (procurator) for him.[19] But although a woman could sue for herself,[20] she could not ordinarily act as a procurator for a litigant[21]: the exception to this rule being the right of a daughter to sue in behalf of aged or sick parents, having no one else to act for them.[22] For the appointment of a procurator any informal mode of authorization or commission was sufficient.[23]

[15] *Inst.* 4, 11, §§ 3–5.

[16] *Comm.* vol. iii, p. 291.

[17] See Mackenzie, *Roman law* [7], p. 442, note.

[18] See for instance supra §§ 445, 453; Paulus, *Sent.* 1, 2, 1; Colquhoun, *Roman law*, § 2207.

[19] *Inst.* 4, 10, pr. and § 1. See *Dig.* 3, 3; *Code*, 2, 12 (13); *Code Theod.* 2, 12. This was possible also in the earlier formulary system of procedure. Gaius, 4, 82–5. In the earliest Roman system of procedure by statute-actions, the appointment of an agent to bring or defend an action was impossible: Gaius, 4, 82. The powers of a procurator in the Later Imperial and Justinianean law were very extensive: *Dig.* 3, 3, 55; Moyle, *Inst. of Justinian*, vol. i, 5th ed., p. 583. A procurator might be appointed to act for another not only in a single lawsuit, but also for all lawsuits: *Dig.* 3, 3, 1, § 1.

[20] *Code*, 2, 12 (13) 4; Paulus, *Sent.*, 1, 2, 2.

[21] *Code*, 2, 12 (13), 18. This work was considered as fit for men alone. A woman could not serve as a procurator even for an absent husband: *Code*, 2, 12 (13), 4. But if no objection was made to a woman acting as procurator until an appeal was taken from the trial court to a higher court, this objection could not then be made: *Code*, 2, 12 (13), 13.

[22] *Dig.* 3, 3, 41.

[23] "Neque certis verbis neque praesente adversario": *Inst.* 4, 10, 1. "Vel per coram vel per nuntium vel per epistulam": *Dig.* 3, 3, 1, § 1. "Ex solo mandato": Gaius, 4, 84. This was true also in the formulary system of procedure, in which period of Roman civil procedure the procurator originated: Gaius, 4, 84. But for the appointment for the formulary agents known as **cognitores** (not found in the extraordinary procedure

Under the Empire if a litigant desired to engage the services of a lawyer or advocate (*advocatus*), he must select a member of the bar.[24] A Roman court had power to assign, if necessary, an advocate to a litigant who was without counsel.[25] Roman law finally permitted the allowance of more than one counsel on each side.[26]

Modern law, like the Roman, allows a litigant to be represented in court. "An attorney at law," says Blackstone, "answers to the procurator, or proctor, of the Civilians and Canonists.[27] And he is one who is put in the place, stead, or *turn* of another, to manage his matters of law."[28] This statement of Blackstone needs just a slight correction: the English barrister or the American attorney at law — unlike the Roman procurator — is always a professional advocate and a member of the bar. Finally, it should not be overlooked that the English and American "proctor", an ecclesiastical and admiralty advocate or lawyer, derives his name from the Roman "procurator".[29]

Joinder of issue (litis contestatio): (1) by defendant's answer containing a general denial. The next step in the proceedings was for the parties to reach a joinder of issue (litis contestatio). In the time of Justinian this was accomplished, either by the defendant filing an answer denying the plaintiff's right or claim, or by further pleadings.[30] It is admitted by Blackstone that from the Roman law came the § 856

of the Later Empire and of Justinian) the authorization must be made in a formal manner, — "certis verbis": Gaius, 4, 83.

[24] The Roman bar is treated infra § 906.

[25] *Dig.* 1, 16, 9, § 5; *Dig.* 3, 1, 1, § 4; *Dig.* 26, 10, 3, § 15.

[26] Mackenzie, *Roman law* [6], p. 444. In one of Cicero's cases a litigant had six advocates.

[27] "Procuratoribus, qui **atornati** in aliquis partibus nuncupantur": *In Sext.*, book 3, title 16, § 3 (Pope Boniface VIII, reigned A. D. 1294–1303).

[28] *Comm.* vol. iii, p. 25.

[29] See Blackstone, *Id.*; Black, *Law dictionary* [2], p. 950; Benedict, *Admiralty* [3], § 334.

[30] The formulary litis contestatio was the ancestor of the Later Imperial litis contestatio, and — although reached differently — it had the same effect as the latter: as soon as the parties joined issue they proceeded to trial (supra § 847).

English Common Law conceptions of joinder of issue and defensive pleadings.[31]

The defendant had 20 days within which to answer the libel or complaint; if he filed an answer denying his liability (*libellus contradictionis*, *libellus responsionis*), it must be sworn to.[32] The next step was to proceed to the trial of the case.

§ 857 **Joinder of issue (litis contestatio): (2) by defensive and rebuttal pleadings. Exception, replication, duplication, and triplication defined.** But perhaps the defendant had some ground of defense. This necessitated recourse to further pleadings. The defendant filed an answer containing his ground of defense, which was called by the appropriate name of exception (*exceptio*).[33]

Exceptions were of two sorts: peremptory, or those which bar further proceedings; and dilatory, or those which merely afford delay for a time.[34] Not only has the Roman "exceptio" survived as to name in many systems of modern procedure—such as the French "exception", the Italian "eccezione", the Spanish "excepción", and the Quebec and Louisiana "exception"[35]—but the Roman conception and classification of exceptions have also descended into modern law. For instance

[31] *Comm.* vol. iii, p. 296.

[32] *Inst.* 4, 16, 1. It must also be signed and dated by the defendant. Moreover, in certain cases, an inequitable, frivolous, or false defense increased—generally doubled, but sometimes tripled—the amount of the defendant's liability (*lis crescens*): see Gaius, 4, 19 and 171; *Inst.* 4, 6, §§ 19, 26–7; *Inst.* 4, 16, 1.

[33] *Inst.* 4, 13, "de exceptionibus," pr. On the subject of exceptions, see *Dig.* 44, 1 and 2; *Code*, 8, 35. The name and conception of an exceptio was a legacy from the formulary procedure (although it inserted the exceptio in the formula): Gaius, 4, 115–25; supra § 848.

[34] "Exceptiones aliae perpetuae et peremptoriae, aliae temporales et dilatoriae": *Inst.* 4, 13, § 8, repeating almost all of Gaius, 4, 120. The "praescriptiones" of the formulary procedure were merged in the exceptiones of the Justinian procedure, and do not exist separately as of old: see supra § 848. An instance of a dilatory exception is where a defendant opposes a libel by alleging that the plaintiff had agreed not to sue for five years.

[35] Code of Civil Procedure of France, 174–86; Italy, 187–92; Spain 531–8, 540; Quebec, 113–6; Code of Practice of Louisiana, 330–47. In the modern civil procedure of Continental European States and of Latin America the exception may also be used to raise questions for which a **demurrer** is employed in Anglo-American law.

the Louisiana Code of Practice reads: "Exceptions are means (§ 857) of defense used by the defendant to retard, prevent, or defeat the demand brought against him.[36] There are two species of exceptions: some are dilatory, others peremptory.[37] Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress.[38] Peremptory exceptions are those which tend to the dismissal of an action. Some relate to forms; others arise from the law."[39]

Large traces of the influence of the Roman exceptions are visible also in the English Common Law: Blackstone, following Bracton,[40] divides pleas into two sorts, — "dilatory pleas and pleas to the action."[41] These defensive pleadings are also known as pleas in abatement and pleas in bar.[42]

That the scope of the Roman exceptio was very wide is seen from the fact that the defendant could plead a set-off (*compensatio*) as a counterclaim against the plaintiff.[43] And the liberality of the Roman law as to what was pleadable as a set-off is repeated in the American law of admiralty procedure: in the case of *The C. B. Sanford*,[44] decided in 1885, the court declares that the practice in admiralty follows the Roman law, and cites the Institutes of Justinian as authority for the allowance of a set-off pleaded by the defendant which had no connection with the plaintiff's claim. It is also interesting to notice that Blackstone ascribes to Roman law the origin of the English Common Law set-off.[45]

Reverting again to Roman law, suppose the defendant's exceptio or answer containing his ground of defense, although seeming just to him, was really unjust to the plaintiff? The plaintiff could then file a replication (*replicatio*) in rebuttal.[46]

[36] Art. 330.

[37] Art. 331.

[38] Art. 332.

[39] Art. 343.

[40] "Exceptiones dilatoriae et peremptoriae": Güterbock, *Bracton*, p. 153.

[41] *Comm.* vol. iii, p. 301.

[42] Heard, *Civil pleading*, pp. 50–52, 54–6.

[43] *Inst.* 4, 6, §§ 30 and 39. See *Code*, 4, 31, 9; *Dig.* 16, 2, 7, pr. Compensatio is treated supra § 741.

[44] 22 Fed. Rep. 863.

[45] *Comm.* vol. iii, pp. 304–5.

[46] *Inst.* 4, 14, pr. The name and conception of a replicatio was a legacy

Moreover, before the parties could reach a joinder of issue (litis contestatio) and be ready to proceed to trial, it might be necessary for the protection of their rights that they employ some or all of the additional rebuttal pleadings, which were the duplication (*duplicatio*), triplication (*triplicatio*),[47] and additional pleadings[48] rarely used. By some Civilians that rebuttal pleading which would naturally follow the triplicatio has been called the *quadruplicatio*.[49]

Rebuttal pleadings are found in modern civil procedure, for instance the Spanish and Anglo-American.[50] The English "replication", "rejoinder", "surrejoinder", "rebutter", and "surrebutter" connote a marked Roman law influence.[51]

2. TRIAL

§ 858 **Forms of evidence: oral and written. Admissibility of evidence. Hearsay.** The Roman law of evidence has exerted a great influence on modern law. Both Roman and modern law exclude facts logically irrelevant.[52] Ordinarily

from the formulary procedure (although it inserted the replicatio in the formula): Gaius, 4, 126.

[47] Both of these are defined in *Inst.* 4, 14, §§ 2–3. Their names and conceptions came from the formulary procedure (although it inserted them in the formula): Gaius, 4, 126–8.

[48] *Inst.* 4, 14, 3, repeating Gaius, 4, 129.

[49] This term does not exist in the sources of Roman law. But it is employed by Colquhoun, *Roman law*, § 2267. Moreover, Blackstone, who is a much earlier writer, uses this term in his list of the Roman pleadings: *Comm.* vol. iii, p. 310. In the Middle Ages it was possible to employ not only a *quadruplicatio*, but a *quintuplicatio* and even a *sextuplicatio:* Colquhoun, *Id.* And modern ecclesiastical courts of the Roman Catholic Church still permit the use of rebuttal pleadings at great length: Smith, *Ecclesiastical law* [5], vol. ii, p. 343.

[50] Code of Civil Procedure of Spain, 546–8; Blackstone, *Comm.* vol. iii, p. 310; Heard, *Civil pleading*, pp. 60–61; Bryant, *Code pleading*, pp. 16–17.

[51] This has descended into English law in several ways, especially via the Canon Law (which as to secular matters is largely Roman law at second-hand). From the *triplicatio*, *quadruplicatio*, and additional pleadings (such as the *quintuplicatio*) of the Canon Law are derived the rejoinders and rebutters of English law: see 12 Green Bag, 396; Colquhoun, *Roman law*, § 2268. The Canon Law is treated supra vol. i, §§ 225–30.

[52] ROMAN LAW: *Code*, 4, 19, const. 10, 17, and 22; *Code*, 7, 16, 17. MODERN LAW: Stephen, *Digest of evidence* (Beers' edition, 1902), art. 3 and 10; Reynolds, *Evidence* [2], § 12.

the testimony of a witness should be confined to facts within his knowledge, and should not include his opinions. But Roman law permitted opinion evidence in exceptional cases, such as the comparison of handwriting.[53] And modern law is the same.[54] (§ 858)

The Roman law divided evidence into oral or parole and written or documentary. Modern law repeats the same classification.[55] Oral evidence is inferior to written evidence: consequently a document is preferred to parole evidence thereof.[56] And parole evidence is inadmissible to vary or contradict a trustworthy[57] document.[58] Oral evidence of a document is not admissible, unless the document is lost.[59] If the original document is still in existence and producible, a copy thereof is inadmissible.[60]

Hearsay evidence was generally excluded.[61] And modern law is the same as the Roman.[62] To claim that the origin of the Anglo-American hearsay rule was our jury system — the necessity of preventing the jury from listening to improper evidence[63] — is to imply "at least that but for the jury system these rules would not now exist"; such a claim

[53] *Code*, 4, 21, 20. See *Nov.* 49, 2, 1.

[54] Stephen, *Id.*, art. 51–2.

[55] Stephen, *Id.* p. xxi.

[56] ROMAN LAW: *Dig.* 22, 3, 10. MODERN LAW (Anglo-American): Reynolds, *Evidence* [2], §§ 58, 61. As to the conclusiveness (in Roman law) of entries made in books of account, or of an inventory in a will, see *Code*, 4, 19, const. 5–7; *Nov.* 48, 1, pr. and 1.

[57] But parole evidence is admissible to prove forgery of a document, or its obtainment by fraud.

[58] ROMAN LAW: "Testes, cum de fide tabularum nihil dicitur, adversus scripturam interrogari non possunt": Paulus, *Sent.* 5, 15, 4. "Contra scriptum testimonium, non scriptum testimonium non profertur": *Code*, 4, 20, 1. MODERN LAW (Anglo-American): Reynolds, *Evidence* [2], § 61.

[59] ROMAN LAW: *Code*, 4, 21, const. 1, 6, and 7. MODERN LAW (Anglo-American): Stephen; *Digest of evidence*, art. 71.

[60] ROMAN LAW: *Dig.* 22, 4, 2. MODERN LAW (Anglo-American), Stephen, *Id.* art. 65.

[61] Hunter, *Roman law* [4], p. 1055. But ancient facts (no longer provable by primary evidence) and dying declarations could be proved by hearsay: *Dig.* 22, 3, 28; 25 Green Bag, p. 304.

[62] Stephen, *Digest of evidence* (Beers), p. 21, art. 14.

[63] Thayer, *Preliminary treatise on evidence*, pp. 180–81, 184, see *Cases on evidence*, 373, 375; *Berkeley Peerage Case*, 4 Camp. 401, 416.

entirely overlooks the facts that Roman law — in which there was no jury[64] — had a hearsay rule quite similar to the English, and that this Roman hearsay rule has descended into certain modern non-English legal systems which did not develop the jury.[65]

§ 859 **Sufficiency of evidence.** The Roman law of the Later Empire and of Justinian required two witnesses to prove a fact: one witness was not enough.[66] The English Common Law, on the contrary, may be satisfied with one witness.[67] And Blackstone takes great pleasure in presenting this "superior reasonableness" of the English rule, although he has just previously stated that "undoubtedly the concurrence of two or more corroborates the proof"[68] — which was exactly the purpose of the Roman rule.

A rescript of the Emperor Hadrian shows the just and sensible view the Romans took as to the sufficiency of evidence: this rescript states that the judge should receive all admissible evidence and draw from it the best possible conclusion.[69]

§ 860 **Production of evidence: (1) the burden of proof.** It was a fundamental Roman rule as to the production of evidence that the burden of proof rests on him who alleges or asserts a fact,[70] and that the burden of proceeding may shift during

[64] In Roman civil procedure there was no jury: see supra §§ 847, 849, 851, infra § 881. But the English trial by jury has a Roman root: there was an institution somewhat like the jury in Roman criminal procedure of the Later Republic and Early Empire: see infra §§ 880–81; supra vol. i, § 371.

[65] Lobingier, *Origin of the "hearsay rule" — was it the jury system?* 25 Green Bag, p. 304. Judge Lobingier gives provisions of the Spanish law: the 7th century *Fuero Juzgo* expressly states the hearsay rule, — book ii, title 4 (5), Scott's English translation; and the *Siete Partidas* (partida 3) elaborately expresses the hearsay doctrine. As to these Spanish law books, see supra vol. i, §§ 281, 290.

[66] "Unius responsio testis omnino non audiatur": *Code*, 4, 20, 9. Prior to Constantine this rule does not seem to have been absolute: *Id.*, and *Dig.* 22, 5, 12. But one of the parties to the suit might make a second witness by taking the decisory oath: see infra § 869.

[67] *Comm.* vol. iii, p. 370.

[68] *Id.*

[69] *Dig.* 22, 5, 3. See the jurist Callistratus' famous homily to judges: *Dig.* 22, 5, 3, pr. This jurist is considered supra vol. i, § 79.

[70] Unless there is a legal presumption in his favor: see infra § 861.

the trial from one party to another.[71] Blackstone states that the English law "agrees with the Civil," as to the rules concerning the burden of proof.[72]

Production of evidence: (2) presumptions. The Roman law recognized both presumptions of fact (*praesumptiones facti seu hominis*) and presumptions of law (*praesumptiones juris*).[73] Both classes of presumptions are found also in Anglo-American law.[74] A presumption of fact is the drawing of an inference as to the existence of a fact by proving the existence of some other fact. § 861

Roman law divided presumptions of law into conclusive (*praesumptiones juris et de jure*) and disputable. This division is repeated in Anglo-American law.[75] A conclusive presumption is a rule of law which cannot be contradicted by evidence.[76] A disputable presumption is an assumption that a certain thing is true until the contrary is proved.

Production of evidence: (3) estoppel. It is quite probable that the Anglo-American estoppel, "which happens when a man hath done some act or executed some deed which estops or precludes him from averring anything to the contrary,"[77] originated from an equivalent Roman doctrine.[78] The claim that the first beginnings of the English doctrine of estoppel came from Roman law, via Canon Law, seems well supported historically.[79] § 862

[71] *Dig.* 22, 3, 2 ("ei incumbit probatio qui dicit, non qui negat); *Dig.* 22, 3, frag. 1, frag. 19, pr., frag. 21; *Code*, 2, 1, 4; *Code*, 4, 19, 1 and 8. See cases given in Hunter, *Roman law*[4], pp. 1057–8.

[72] *Comm.* vol. iii, p. 366. For American law, see Stephen, *Digest of evidence* (Beers' edition, 1902), arts. 93, 95–7.

[73] See *Dig.* 22, 3 "de . . . praesumptionibus"; *Bas.* 22, 1, 1–29.

[74] Black, *Law dict.*[2], pp. 935–6; Stephen, *Digest of evidence* (Beers), art. 98–101.

[75] *Id.*

[76] An illustration of a Roman conclusive presumption was the rule that a child born later than the tenth month after the dissolution of marriage is not legitimate: *Dig.* 38, 16, 3, § 11. See *Dig.* 28, 2, 29, pr.; *Code*, 6, 29, 4.

[77] Blackstone, *Comm.* vol. iii, p. 308. Estoppel is treated by Stephen, *Digest of evidence* (Beers), art. 102–5.

[78] See for example *Inst.* 3, 21, "plane si quis debere se scripserit, quod numeratum ei non est, de pecunia minime numerata post multum temporis exceptionem opponere non potest; hoc enim saepissime constitutum est."

[79] See Riezler, *Venire contra factum proprium*, Leipzig, 1912. (Reviewed in 37 Law Mag. and Rev. pp. 382–3, — May, 1912). In favor of

§ 863 **Production of evidence: (4) documents.** Any person who could be summoned as a witness could also be called upon to produce documents.[80] Proof of the authenticity of a document was supplied as follows: if a document was attested, by calling the witnesses, or if dead, by a comparison of handwriting[81]; if a document was unattested, by production of other documents (made by the same party) to compare handwriting.[82] And modern law is the same.[83]

But Roman law did not ordinarily allow a plaintiff or a defendant to demand of his adversary that he produce documents; this seems to be a remnant of the ancient Roman theory that a lawsuit was a sort of private quarrel, for the prosecution of which each party could not expect any help from the other side.[84] To this rule, however, there were important exceptions: money-lenders or bankers[85] and other persons suing for money could be called upon to produce their books.[86]

the claim that the origin of the English estoppel is the Roman-Canonistic doctrine of *venire contra proprium factum nulli conceditur* are the following facts: one of the Decretals, which emphasize this Canonistic doctrine of Roman origin, is a 12th century Decretal of Alexander III, addressed to the Bishop of London (X, i, xvii "de filiis presb.", c. 5); it is true that the fathers of the English Common Law, Glanville and Bracton (supra vol. i, §§ 372, 374), were largely influenced by Roman-Canonistic conceptions and rules; furthermore, in Glanville's writings there are traces of the later English estoppel by deed (*De legibus*, x, ch. 12). Canon Law is treated supra vol. i, §§ 225–30.

[80] Provided the production of a document would not harm him: *Code*, 4, 21, 22.

[81] *Code*, 4, 21, 20.

[82] *Nov.* 49, 2, § 1.

[83] Stephen, *Digest of evidence*, art. 66.

[84] *Code*, 4, 20, 7; see supra § 842, actio sacramenti. As to criminal law see *Code*, 2, 1, 2.

[85] See supra § 805.

[86] As to *argentarii*, see *Dig.* 2, 13, frag. 4, pr.; frag. 9, § 2. As to creditors in general, see *Code*, 2, 1, 5. But a creditor could not compel a debtor to produce his books: *Code*, 2, 1, 8.

Production of evidence: (5) **witnesses.** The court issued summons for the witnesses.[87] Their expenses must be paid by the litigant who had them summoned.[88] In the Later Imperial and Justinianean law the witnesses should be sworn before giving their testimony.[89] So too in Anglo-American law the testimony of witnesses must be given upon oath.[90] In the time of Justinian a witness was ordinarily sworn by touching the Bible.[91] § 864

The use of leading questions was not always permitted in Roman law, because such questions are really suggestions to a witness.[92] And for the same reason Anglo-American law has placed limits on the use of leading questions.[93]

Not every person was competent, in Roman law, to be called as a witness: persons of extreme youth and persons convicted of crime were absolutely incompetent[94]; and these persons are incompetent also in modern law.[95]

[87] *Code*, 4, 20, 16. This statute provided also for the taking of testimony by a commission, when the witness lived at a distance from the place of holding the court.

[88] *Code*, 4, 20, 11. Witnesses should not be kept for a period exceeding 15 days: *Code*, 4, 20, 19.

[89] *Code*, 4, 20, 9. Although **torture** might be inflicted on defendants in criminal cases (*Dig.* 48, 18, 1, § 1), torture was prohibited in civil cases, except of slaves and then only when it was necessary to ascertain the truth which was being concealed: *Dig.* 48, 18, 9; *Code*, 9, 41, 9; see *Dig.* 48, 18, frag. 1, § 10 and frag. 8; *Code*, 9, 41, 7. See also Mackenzie, *Roman law*[7], pp. 385–6, note 2.

[90] Stephen, *Digest of evidence*, art. 123.

[91] "Sacris scripturis tactis": *Code*, 4, 1, 12, § 5 (A.D. 529).

[92] "Qui quaestionem habiturus est, non debet specialiter interrogare, an Lucius Titius homicidium fecerit, sed generaliter, *quis* id fecerit: alterum enim magis suggerentis quam requierentis videtur. Et ita divus Trajanus rescripsit": *Dig.* 48, 18, 1, § 21. This case involved the torture of a slave.

[93] Stephen, *Digest of evidence*, art. 128 (Beers' Am. edition, pp. 465–6).

[94] *Dig.* 22, 5, frag. 3, § 5; frag. 15, pr.; frag. 18, frag. 20. See *Nov.* 90, 7. Justinian made incompetent all pagans and heretics: *Code*, 1, 5, 21. A bishop must not be summoned to court as a witness (*Code*, 1, 3, 7); the court should send an officer to him to take his testimony: *Nov.* 123, 7.

[95] Stephen, *Digest of evidence* (Beers), art. 107 and pp. 406–7.

Magistrates could not be summoned as witnesses.[96] The aged, the sick, soldiers, and persons absent on business for the State could not ordinarily be summoned as witnesses.[97] Near relatives of the plaintiff or defendant were excluded as witnesses.[98] Children could not testify against their parents, and vice versa.[99] Slaves were usually incompetent witnesses against their masters.[100]

The plaintiff and defendant could not testify against each other.[101] This rule descended into the English Common Law: but this incompetency has been removed by statute in England and generally in the United States.[102]

In Roman law the testimony of a lawyer as to a cause in which he had been engaged was inadmissible.[103] And the modern Anglo-American law is the same.[104]

§865 **Variance (plus petitio).** The formulary procedure of the Republic and Early Empire contained some harsh rules as to variance (*petere plus vel minus, plus petitio*[105]): if a plaintiff claimed more than he could prove, his case was forever dismissed from court and fell to the ground, for he ought to have calculated exactly the amount of his claim [106]; if a plaintiff actually claimed too little, he could obtain only what he had put down as his claim, even although he proved more.[107] But these technical rules as to variance due to overclaim or underclaim are not found in the extraordinary procedure of

[96] *Dig.* 22, 5, 21, §1. But if in court, they should give their testimony.

[97] *Dig.* 22, 5, 8.

[98] *Dig.* 22, 5, 6.

[99] *Dig.* 22, 5, 4; *Code*, 4, 20, 6. This prohibition extended also to persons related by affinity, to cousins and cousins' children: *Dig.* 22, 5, 4.

[100] *Dig.* 22, 5, 7; *Dig.* 22, 3, 7; *Code*, 4, 20, 8. And ex-masters and freedmen could not testify against each other: *Dig.* 22, 5, 4; *Code*, 4, 20, 12.

[101] *Dig.* 22, 5, 10; *Code*, 4, 20, 10.

[102] Stephen, *Digest of evidence*, note 41 to art. 108, (Beers' edition, pp. 406, 407, 409, 540).

[103] *Dig.* 22, 5, 25.

[104] Stephen, *Digest of evidence*, art. 115, (and Beers' edition, pp. 429–31).

[105] This is written as two words in *Code*, 3, 10. But it is written as one word, "pluspetitio", in *Bas.* 7, 6.

[106] Gaius, 4, 53–60.

[107] Gaius, 4, 57.

the Later Empire and Justinian: then the judge simply reduced or increased the amount of the plaintiff's claim as proved by the evidence.[108]

Variance, or the discrepancy between a claim and the evidence offered to support the claim, is recognized in the English Common Law, which originally applied this doctrine with such rigidity and severity as to bring the law into a "disgraced state."[109] But the later reformed system of pleading, commonly known in the United States as "code" pleading, has now modified in a sensible manner the Common Law doctrine of variance: namely, immaterial variances and even certain material variances (which, although not amounting to a complete failure of proof, would have been fatal at Common Law) are now curable either by amendment of the pleadings or by some other action of the court.[110]

§ 866 **Arguments of counsel.** Although in the age of Cicero the time allowed counsel for arguments was fixed by the court in its discretion, under the Later Empire an advocate was generally permitted to speak as long as he desired.[111] The professional costume of the advocate was the white *toga*, the original dress of Roman citizens.[112]

§ 867 **Special modes of terminating lawsuits: (1) admission (confessio in jure).** In Roman law the defendant might voluntarily admit the plaintiff's claim or cause of action.[113] This enabled the plaintiff to move for judgment and its execution.[114] Admission or confession of the plaintiff's claim is

[108] *Inst.* 4, 6, 33–5. The formulary rules as to variance were abolished by statutes of Zeno and Justinian: *Code*, 3, 10, 1–2.

[109] Bryant, *Code pleading*, pp. 302–3; see Heard, *Civil pleading*, pp. 74–7.

[110] Bryant, *Id.* p. 303. See Williams, *Inst. of Justinian* [2], p. 283.

[111] *Code*, 2, 6, 6, § 5; Mackenzie, *Id.* pp. 443–4. The technical expression employed when a judge increased the time allowed for argument was *dare aquam* (to give water), because of the clepsydra or water-clock used in the Roman tribunals.

[112] Mackenzie, *Id.* p. 442.

[113] *Dig.* 42, 2, 5. See *Dig.* 42, 2, 8; *Dig.* 2, 14, 40, 1; Savigny, *System*, vol. vii, §§ 303–4; Hunter, *Roman law* [4], p. 1003.

[114] *Code*, 7, 53, 9; Paulus, *Sent.* 2, 1, 5.

a recognized doctrine of many modern systems of law, including the Anglo-American and the Spanish.[115]

§ 868 **Special modes of terminating lawsuits: (2) interrogatories (interrogationes).** A Roman court had power to question the defendant, who might also be interrogated by the plaintiff.[116] The use of interrogatories had been widely extended and employed under the formulary procedure of the Early Empire.[117] In Anglo-American law the plaintiff may question the defendant by interrogatories which he inserts in his pleading.[118]

§ 869 **Special modes of terminating lawsuits: (3) decisory oath (jusjurandum or juramentum in jure).** When all other evidence was exhausted, the Roman law allowed a party to obtain if possible the facts from the opposite party by tendering him in court an oath ("jusjurandum" or "juramentum");[119] and this "reference to the oath"[120] or "decisory oath[121]" was conclusive as to the fact or facts referred.[122]

[115] Black, *Law dictionary*[2], "judgment by confession," p. 665; *Code of civil procedure* of Spain, book ii, title ii, chapter i, section v, § 1, "confession in court".

[116] *Dig.* 11, 1, frag. 9, § 1, frag. 21; Savigny, *System*, vol. vii, § 305. In Justinian's time interrogatories were admissions: *Dig.* 11, 1, 1, § 1. As to the list of topics concerning which interrogatories might be asked, see Hunter, *Roman law*[4], pp. 1004–5.

[117] The so-called *actio interrogatoria* to try preliminary issues (*praejudicia*) for the purpose of modifying the formula to be given: Savigny, *Id.*, has reconstructed a formula for this action.

[118] Bryant, *Code pleading*, p. 207. Interrogatories are available in equity and in admiralty practice: *Id.;* Benedict, *Admiralty*[3], §§ 472, 477. In admiralty practice the defendant may propose interrogatories to the plaintiff: Benedict, *Id.* § 477. It should not be overlooked, however, that it is now possible in American law to examine the opposite party on oath "either before or after the pleadings are in": Bryant, *Id.*

[119] This word is occasionally used: see *Dig.* 12, 2, 34, § 5; *Dig.* 22, 3, 25, § 3.

[120] Mackenzie's term: *Roman law*[7], p. 383.

[121] Hunter's term: *Roman law*[4], p. 1005.

[122] *Inst.* 4, 6, 11; *Dig.* 12, 2, frag. 40 and 31. An oath tendered in jure was "necessarium", and could not be refused. If the party did refuse, his action amounted to a "confessio" or admission (*Dig.* 12, 2, 38; supra § 866), unless at the same time he himself referred the matter back again to the proposer by tendering him also an oath (*Id.*). On the subject of the *jusjurandum in jure* see Paul. *Sent.* 2, 1; *Cod. Gregorian*, 3; *Cod. Hermo-*

The Roman doctrine of a decisory oath [123] has survived widely in modern law, being found for instance in the Scotch, French, Italian, Spanish, and Quebec law.[124]

3. PROCEEDINGS AFTER TRIAL

Judgment and appeal. According to the latest system of Roman civil procedure the judge was not confined to pronouncing simply a money-judgment [125]; he could require the defendant to specifically perform his obligation.[126] The Roman law held that a matter adjudged should be accepted as the truth [127]; and this Roman maxim has been adopted by English law.[128] § 870

Abundant provision was made in the Imperial Roman law for the carrying of a case by appeal from an inferior to a higher court.[129] In the time of Justinian, notice of appeal

genian. "de jurejurando"; *Dig.* 12, 2; *Dig.* 44, 5, 1, pr.; *Code*, 4, 1, especially const. 3; *Nov.* 51; *Bas.* 22, 5; *Hexabiblos*, 1, 7; Savigny, *System*, vol. vii, §§ 307–14; Abdy and Walker, *Institutes*, p. 383; Hunter, *Roman law* [4], pp. 1005–6; Mackenzie, *Roman law* [7], pp. 383–4; Petit, *Droit romain* [7], § 415; Colquhoun, *Roman law*, § 2336; Amos, *Roman law*, p. 196. See Mackeldey (Dropsie), *Roman law* [14], § 475.

[123] There were other oaths of a special nature in Roman law. (1) The **jusjurandum or juramentum calumniae,** which attorneys had to take for the purpose of indicating that their clients had just cause of action and were not suing vexatiously: *Code*, 2, 58 (59), 2; see supra § 853. (2) The oath in litem — **jusjurandum or juramentum in litem** — which sometimes the court allowed a plaintiff to take in order to assess or fix the damage suffered by the loss of an object: *Dig.* 12, 3; *Dig.* 16, 3, 1, § 26; *Code*, 5, 53; *Code*, 8, 4, 9; *Bas.* 22, 6; *Bas.* 38, 15. The oath in litem has survived in modern law, for instance the French and Scotch: *Civil code* of France, 1366; Dickson, *Evidence* [2], § 1506; Mackenzie, *Roman law* [7], p. 384.

[124] Mackenzie, *Roman law* [7], p. 384; *Civil code* of France, 1357 et seq. (it is called "serment décisoire"); Italy, 1364 et seq. (it is called "giuramento decisorio"); Spain, 1236–8 (it is called "juramento decisorio"); *Code of civil procedure* of Spain, 579; Quebec, 443.

[125] As was the case in the Later Republican and Early Imperial formulary procedure.

[126] See supra § 730.

[127] "Res judicata pro veritate accipitur": *Dig.* 1, 5, 25.

[128] Broom, *Legal maxims*, p. 333; Kent, *Comm.* vol. ii, p. 120; Williams, *Inst. of Justinian* [2], p. 314.

[129] See infra §§ 894–901, 904; Hunter, *Roman law* [4], pp. 71–2, 1044–8; Moyle, *Inst. of Justinian*, vol. i, 5th ed., p. 655.

(§870) must be given either verbally when the judgment was pronounced,[130] or in writing within 10 days from the rendition of the judgment.[131] The appellant must give security for costs.[132]

When an appeal was not taken at the time of the rendition of the judgment, the appellate proceedings were as follows. First, the appellant drafted a written petition of appeal, containing the names of all the parties to the suit, the judgment rendered, and the grounds of appeal[133]: this petition of appeal (*libellus appellatorius*) he gave to the trial judge, who generally could not refuse an appeal.[134] Then the judge sent the appeal to the appellate court.[135] His notification to the appellate court was known as *litterae dimissoriae* or *apostoli*,[136] except when the appeal was carried directly to the Emperor — then it was called *relatio*.[137] Within 30 days the entire record of the case must be sent to the appellate court.[138] The appellant must prosecute his appeal within a certain time (which never exceeded six months), or lose his appeal.[139]

[130] *Dig.* 49, 1, 2.

[131] *Nov.* 23, 1; see *Dig.* 49, 1, 3 and 4.

[132] Paulus, *Sent.* 5, 33, 2 and 1. Originally there were no costs attached to failure of appeal, but in the time of Paulus (died after A. D. 222) a defeated appellant had to pay fourfold the costs of the appellee or opposite side: *Sent.* 5, 37, 1. Subsequently, by a statute of Diocletian, the amount of the costs was left to be fixed by the appellate court itself: *Code*, 7, 62, 6, § 4.

[133] *Dig.* 49, 1, frag. 1, § 4, frag. 13, § 1. See *Dig.* 49, 1, 3, § 3.

[134] A judge who improperly denied an appeal was punishable by a fine: *Code*, 7, 62, 22 and 31. If the judge without cause would not allow an appeal, the aggrieved party could appeal from such an unwarranted refusal directly to the appellate court: *Dig.* 49, 5, 5, pr. A written copy of the judge's reasons for refusing an appeal ought to be given to the petitioner demanding the appeal: *Dig.* 49, 5, 6; *Dig.* 49, 1, 25.

[135] *Dig.* 49, 6, 1, pr.; *Dig.* 50, 16, 106.

[136] See *Dig.* 49, 6, 1, § 1.

[137] *Cod. Theod*, 11, 30, 1; see title of *Dig.* 49, 1.

[138] *Code*, 7, 62, 24, repealing an earlier statute giving only 20 days: *Cod. Theod.* 11, 30, 8. Mutilation or suppression of any part of the record made the trial judge punishable by infamy: *Code*, 7, 62, 15; see supra § 453.

[139] *Code*, 7, 63, 5, pr.; *Nov.* 119, 4. Appellants living in the nearest provinces were given three months and five days; appellants from distant provinces, six months.

A judgment might be reversed on appeal. In its review of the case the appellate court could receive new evidence,[140] or even listen to new arguments which might have been presented to the trial court.[141] The appellate court did not remand cases for new trial in the lower court.[142] The effect of an appeal was to suspend the execution of the judgment, until the appeal was decided.[143]

Costs. In the law of Justinian the defeated litigant had to pay costs to the victor.[144] Blackstone notes that English law, like the Roman, gives costs to the victorious litigant.[145] § 871

Execution of judgments. The Justinian mode of executing judgments was seizure and sale of the judgment-debtor's property by public officials.[146] This was a legacy from the Early Imperial law, the Emperor Antoninus Pius having introduced this mode of executing a judgment.[147] The modern mode of executing a judgment is the same as this latest Roman mode. § 872

[140] *Code*, 7, 62, 6, § 1.

[141] *Code*, 7, 63, 4.

[142] *Code*, 7, 62, 6, pr.

[143] *Dig.* 49, 7, 1; *Code*, 7, 62, 3.

[144] "In expensarum causa victum victori esse condemnandum": *Code*, 3, 1, 13, § 6. See *Nov.* 82, 10. It was the privilege of the victorious litigant to estimate the costs; but he had to do so on oath (*jusjurandum de expensis*). The early Roman law contained no provisions as to costs: for the steps which were taken to arrive at a system of costs see Hunter, *Roman law* [4], pp. 1019–20.

[145] *Comm.* vol. iii, p. 399.

[146] *Code*, 8, 22 (23), 2. These officers of court were known as *officiales* or *apparitores*.

[147] *Dig.* 42, 1, frag. 31, frag. 6, § 2; *Code*, 7, 53, 9. Movables should be seized first and exhausted, then land: *Dig.* 42, 1, 15, § 2. As to what kinds of movable property could be seized, see also *Code*, 8, 16 (17), 7; *Code*, 7, 53, 5; *Dig.* 42, 1, 15, §§ 9–11. The earliest Roman mode of executing a judgment-debt was imprisonment of the debtor by the creditor (**manus injectio**): see supra § 716. (Private prisons were not abolished until late in the 5th century: see *Code*, 9, 5.) After awhile the praetor developed another mode of executing a judgment debt, — getting directly at *all* the debtor's property by placing him in bankruptcy (supra § 716): this mode, although an improvement, was still execution against the person. Finally there was developed Antoninus Pius' mode of enforcing a judgment, which involved no execution against the person.

PART II

PUBLIC LAW

PART II

PUBLIC LAW

CHAPTER I

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Introduction. The difference between public and private law has already been stated.[1] Moreover, many fundamental topics of Roman constitutional and administrative law have already been treated elsewhere. Among the subjects previously considered are: the royal authority[2]; the various legislative assemblies and the Senate[3]; magistrates of the Republic, including the consul, praetor, tribune of the plebs, and aedile[4]; the Emperor[5]; provincial administration[6]; and citizenship.[7] At this place will now be given a special consideration of two other important topics: the Roman judicial organization and Roman municipal corporations. § 873

1. THE ROMAN JUDICIAL ORGANIZATION

(1) Courts and Judicial Officers of the Roman Republic

Introduction. The Roman magistrates of the Republic were either elected by the people or appointed by the Senate. The Roman judicial magistrates usually possessed both crim- § 874

[1] Supra § 427.

[2] Supra vol. i, §§ 30–31.

[3] Supra vol. i, §§ 49, 55, 111, 114.

[4] Supra vol. i, §§ 40–41, 43, 60–61, 112. There are treated more amply infra §§ 875–8; 886–9.

[5] Supra vol. i, §§ 55, 68, 69, 115, 120, 173, 184. The Emperor is treated more amply infra § 894.

[6] *Id.* See infra §§ 882, 890.

[7] Supra vol. i, § 58; vol. ii, §§ 441–3.

inal and civil jurisdiction — as for instance the praetor, provincial governor, and aedile.

§ 875 **Consuls.** These magistrates, usually two in number, were elected annually in the *comitia centuriata*.[8] The consuls were presidents of the Senate.[9] The consuls had succeeded to all the powers of the Kings, including the judicial power: but when, in 367 B.C., the office of praetor was created by the *lex Licinia*,[10] thereafter the consuls ceased to have contentious civil jurisdiction. But they still retained voluntary jurisdiction — for instance cases of manumission of slaves.[11]

Although originally at the commencement of the Republic the consuls had unrestricted criminal jurisdiction (as is seen by their action inflicting punishment on the rebellious sons of Brutus), the consuls soon lost this power after the *lex Valeria* was passed, in 509 B.C., providing that an appeal could be taken by any Roman citizen to the *comitia centuriata* from the sentence of death or of scourging pronounced by any magistrate,[12] particularly the consul.[13] But in times of great commotion when the State was endangered, the consuls or dictator were often given by decree of the Senate absolute power, including the power to punish capitally or to inflict summary justice upon any citizen without regard to the ordinary forms of law.[14]

§ 876 **Pontifex maximus, censors, tribunes, dictator.** All these officers of State, except the tribune of the plebs, had a rather slender connection with judicial jurisdiction.[15] But the power of the tribunes of the plebs to *veto* was an important factor in appeals and appellate jurisdiction during the Republic.[16]

[8] Willems, *Droit public romain* [7], pp. 141, 229. This assembly is defined supra vol. i, § 49.

[9] Willems, *Id.* p. 123.

[10] See Willems, *Id.* pp. 72, 229.

[11] *Dig.* 1, 10, 1, pr.; Willems, *Id.* p. 231.

[12] Willems, *Id.* p. 48.

[13] *Dig.* 1, 2, 2, § 16.

[14] See Mommsen, *Strafrecht*, i, pp. 152 et seq.; Willems, *Id.* p. 231.

[15] As to the functions of these officials see Willems, *Id.* pp. 40, 143, 230, 285, 289, 425, 430, 563 (all on *pontifex maximus*), 250–60 (*censors*), 260–67 (*tribunes of the plebs*), 234–43 (*dictator*).

[16] See infra § 886.

The historian Froude makes an interesting comparison between the officials of the Bishops' Consistory Courts (prior to the Reformation in England) and the Roman censors, holding that the functions of these English officials "resembled in theory the duties of the censors during the Roman Republic." [17]

Praetors. These magistrates were annually elected in the *comitia centuriata*.[18] The praetors, like the consuls, wore a purple robe, had a curule chair, and were attended by lictors.[19] The praetors were the highest judicial magistrates of the Republic.[20] At first, in the year 367 B.C. when the lex Licinia created the praetorship, there was but one praetor — the city praetor (*praetor urbanus*[21]). But in 242 B.C. another praetor was created — the praetor for foreigners and non-citizens (*praetor peregrinus*[22]). § 877

Twenty years later, in 227 B.C., the number of the praetors was increased to 4, one for each of the newly conquered provinces of Sardinia and Sicily.[23] After the conquest of Narboune (Southern France) and Spain, two more praetors were created, making 6 altogether.[24] Sulla raised the number of the praetors to 10, and Julius Caesar to 12; still later Augustus added four more, making 16 altogether.[25] All the praetors differed in rank: the highest was the city praetor, who also filled the office of consul during the latter's absence from Rome.[26]

Aediles. In 494 B.C., the very year also of the creation of the tribunes of the plebs, two new magistrates were established — namely the aediles.[27] In the time of Julius Caesar the number of the aediles had increased to 6. The aediles had a § 878

[17] *Henry VIII*, vol. i, ch. 3.

[18] Willems, *Id.* pp. 141, 245. This assembly is defined supra vol. i, § 49.

[19] Willems, *Id.* p. 245.

[20] After the consuls were deprived of their judicial power: see supra § 875

[21] *Dig.* 1, 2, 2, § 27. This praetor is treated supra vol. i, § 40.

[22] *Dig.* 1, 2, 2, § 28. This praetor is treated supra vol. i, § 43. See also Willems, *Droit public romain* [7], p. 244.

[23] *Dig.* 1, 2, 2, § 32; Willems, *Droit public romain* [7], p. 244.

[24] *Dig.* 1, 2, 2, § 32; Willems, *Id.* This was done in 197 B.C.

[25] *Dig.* 1, 2, 2, § 32.

[26] Willems, *Id.* p. 245.

[27] *Dig.* 1, 2, 2, § 21; Willems, *Id.* pp. 260, 267.

variety of duties. They were police commissioners; and, as such, they supervised the inspection of public buildings, streets, markets, weights and measures, and public games.[28] As magistrates with the right to issue edicts,[29] they had jurisdiction of cases involving nuisances, sales of unwholesome food, the hoarding of provisions during times of scarcity, and sales of defective or dangerous cattle, horses, or slaves (rendering the seller liable to the buyer).[30]

§ 879 **Centumviri.** The court of the centumviri was a permanent tribunal of ancient origin: it was certainly in existence during the second half of the 3d century B.C.[31] The centumviral court possessed continuous existence, although its members were probably elected annually.[32] The court of the centumviri was so closely identified with the earliest system of Roman civil procedure, the statute-actions (*legis actiones*[33]), that this ancient procedure continued to be employed in the centumviral court long after it had been abolished in the other Roman courts.[34]

It is not definitely known whether the centumviri had any criminal jurisdiction. It is not clear whether the court of the centumviri had a special civil jurisdiction. According to Cicero, questions of quiritary ownership,[35] servitudes, wills, intestate succession, guardianship (*tutela*[36]), and status could be litigated in the centumviral court.[37]

[28] Willems, *Id.* pp. 269–71.

[29] See vol. i, §§ 50, 61; *Dig.* 21, 1; Gaius, 1, 6; Willems, *Id.* p. 271. Some authorities hold that edicts were issuable only by the curule aediles, who were established the very year of the creation of the praetorship (367 B.C., supra § 877) and were so called because originally they sat on chairs of ivory.

[30] See *Dig.* 21, 1, §§ 40–42; supra § 790; Willems, *Id.* p. 270; Hunter, *Roman law* [4], p. 44.

[31] See Willems, *Id.* p. 311, note 4, for a discussion of the origin of this tribunal.

[32] Hunter, *Roman law* [4], p. 49.

[33] Treated supra §§ 841–5.

[34] Gaius, 4, 31 (died after c. A.D. 180).

[35] Supra § 573.

[36] Supra § 522.

[37] *De orat.* 1, 38; Willems, *Droit public romain* [7], p. 313.

Quaestiones perpetuae (criminal courts). During the Mon- § 880
archy the judicial power, criminal as well as civil, belonged to the King.[38] When the Republic was established, the criminal jurisdiction of the King passed to the consuls and other magistrates having the *imperium*; but they soon lost it; in 509 B.C. was enacted the *lex Valeria*, which provided that the criminal sentence of any such magistrate could be taken on appeal to the *comitia centuriata*.[39] Thus the direct jurisdiction of this legislative assembly over crimes became recognized. And the Law of the XII Tables expressly provided that cases involving the life or citizenship of a citizen were to be decided by the *comitia centuriata*.[40]

But in practice this supreme criminal jurisdiction of the Roman people, assembled in their legislature, soon began to be delegated, owing to the unwieldy number of the comitia, to commissions called *quaestiones*. Originally these commissions were merely temporary or appointed for the occasion.[41] But subsequently these tribunals became permanent or appointed for an entire year (*quaestiones perpetuae*). The first of these courts was created by the *lex Calpurnia*, in 149 B.C., for the trial of provincial officials charged with extorting or receiving bribes.[42] Subsequently the same system was made applicable to other crimes, so that finally each crime had its tribunal, its procedure, and its punishment.

The judge presiding over these Roman criminal courts (*quaestiones perpetuae*) was either one of the praetors[43] or a special judge (*judex quaestionis*).[44] The presiding judge, whoever he was, did not decide cases brought before him — his duty was confined to the administration of the law of his

[38] Willems, *Id.*, pp. 32–5.

[39] Supra § 875; Willems, *Id.* pp. 48–52, 144–8, 299.

[40] *XII Tables*, ix, 2.

[41] As to the *quaestiones extraordinariae*, see Willems, *Droit public romain* [7], pp. 147–8, 299.

[42] *De repetundis:* Willems, *Id.*, p. 300.

[43] If a praetor, he was appointed by the law creating the court: for instance in the court de repentundis, by the lex Calpurnia, the *praetor peregrinus* presided. The praetors are treated supra § 877.

[44] Willems, *Id.* p. 300. This special judge had to take an oath of office before beginning his duties.

court. To a jury (*consilium*), drawn from certain classes of Roman citizens,[45] belonged the function of decision: after hearing the evidence in a case the jurors (*judices*) gave their verdict, which, after the *lex Cassia* of 137 B.C., must be by ballot.[46]

Notwithstanding the creation of these permanent criminal tribunals, the theoretically supreme jurisdiction of the legislative assembly still continued, as is shown by the fact that the comitia directly exercised judicial authority in cases of crimes — such as treason (*perduellio*) — for the trial of which no quaestio perpetua had been provided: such criminal prosecutions were always brought before the comitia, which might or might not delegate their trial to a special commission (*quaestio extraordinaria*)[47].

§ 881 **Judices, arbitri, recuperatores.** In modern times much confusion has arisen concerning the functions of the Roman judex, which is due to a failure to always discriminate between the civil and the criminal judex. But some allowance should be made for this confusion, in view of the fact that all judices — both civil and criminal — were chosen from the same classes of Roman citizens.

Court-referees (civil judices[48]) and jurors (criminal judices[49]) were selected by the litigants or by the accuser and the accused from the official list of judices (album judicum), which by the time of Augustus — if not earlier — had become the same for civil or criminal trials.[50] For centuries Senators alone were eligible to be a civil or criminal judex. Through the legislation of Caius Gracchus in 123 B.C. the knights (equites) obtained this privilege, which was also removed from the Senators.[51] A struggle between the

[45] See infra § 881; Willems, *Droit public romain* [7], pp. 300, 302. These criminal judices, mentioned above, were different from the civil judex or court-referee employed in civil lawsuits.

[46] Willems, *Id.* p. 137, see also p. 306.

[47] Willems, *Id.* p. 307.

[48] See supra § 849.

[49] See supra § 880.

[50] See Willems, *Droit public romain* [7], pp. 300, 311–12; Hunter, *Roman law* [4], pp. 46–7.

[51] Willems, *Id.* p. 301.

two orders ensued. Finally, after the legislation of Pompey (§ 881) in 70 B.C., the judices were chosen from the Senators, knights, and treasury tribunes.[52] Augustus added a fourth, and Caligula a fifth, class.[53] Under Augustus the number of eligible judices amounted to 4000.[54]

1. **Civil judex (court-referee).** During the Republic and the Early Empire the Roman civil judex was a private citizen (not even necessarily a lawyer) appointed by the praetor or other magistrate to hear the evidence in a civil case, decide the issues raised therein, and report his decision (*sententia*) to the court appointing him:[55] in other words, the civil judex was a court-referee.[56] Before beginning his duties, the judex took an oath of office.[57] Only in the earliest and the latest periods of Roman civil procedure did "judex" mean a "judge", in the modern Anglo-American sense of this word.[58]

In the Republican and Early Imperial formulary system of civil procedure, "judices" became a term applicable to all classes of referees whether called "judices", "arbitri", or "recu-

[52] *Id.*

[53] Willems, *Id.* p. 466.

[54] *Id.* The persons enrolled in the *album judicum* were known as *judices selecti.*

[55] See supra §§ 843, 847, 849. His decision, during the Republic, was not appealable: Willems, *Id.*, p. 312.

[56] Supra § 849. "The civil judex, like the praetor himself, was not a trained lawyer. He has been compared with the modern jury, but this analogy is even more misleading than such analogies usually are. In English law there is no functionary that fills exactly the office of *judex.* His functions were in a sense unique. He alone, a single *judex*, a man unacquainted with law, sat without the help of any superior judge, and pronounced judgment in the cause. He might, indeed, seek or listen to the advice of jurisconsults or others, but he was entirely free to pronounce his own sentence": Hunter, *Roman law* [4], p. 47. See also Moyle, *Inst. of Justinian*, vol. i, 5th ed. p. 643, note.

[57] Willems, *Droit public romain* [7], p. 312.

[58] Williams, *Inst. of Justinian* [2], p. 326; see supra §§ 841, 851. When the Kings governed Rome, if Cicero is to be believed, the Kings heard causes themselves and did not allow the intervention of any private referees (judices): *De republica*, 5, 2. In A.D. 294 the centuries-old practice of the Republic and Early Empire, permitting the use of court-referees, was abolished: *Code*, 3, 3, 2–3. Thereafter the judex was the same as a modern judge.

peratores".[59] Cicero regarded the difference between "judex" and "arbiter" as shadowy.[60] The real difference was this: for the hearing of a case only one judex was appointed, but there might be several arbitri.[61]

The difference between "judices" and "recuperatores" was this: originally, no judex could be compelled to act in a lawsuit between Roman citizens and foreigners — judices were for citizens alone[62]; consequently litigation between non-citizens was referred to trial to recuperatores, three or five in number.[63] Subsequently, recuperatores were employed in suits between citizens.[64]

2. **Criminal judex (juror).** In the Roman criminal procedure of the Republic and the Early Empire the term "judices" refers to the *consilium* or jurymen[65] of any special or permanent criminal court (*quaestio*[66]), who on the day of trial of a case were chosen by ballot from the available list of private citizens (*album judicum*), were sworn, and who, after listening to the evidence, decided the guilt or innocence of the accused by a majority verdict.[67]

The Roman criminal judex was very much like the Anglo-American juror.[68] This is not strange, for the parentage of the English Common Law jury has a Roman strain which has exerted far more influence than the Teutonic strain.[69]

§ 882 **Provincial governor (proconsul, propraetor).** The Roman provincial governor was not merely a military officer: he also

[59] Hunter, *Roman law* [4], p. 44.

[60] *Pro Murena*, 12.

[61] Hunter, *Roman law* [4], p. 48.

[62] Festus, 274: see Willems, *Droit public romain* [7], p. 312; Hunter, *Roman law* [4], p. 51.

[63] Willems, *Id.*

[64] Willems, *Id.* p. 313.

[65] The terms "jury" and "criminal jurors" are used by Hunter, *Roman law* [4], pp. 44, 58–9. Their number varied; in important cases it was from 56 to 100; in ordinary cases the number was probably less: Willems, *Id.* p. 302; Colquhoun, *Roman law*, § 45.

[66] See supra § 880.

[67] Willems, *Droit public romain* [7], pp. 305–6; Hunter, *Roman law* [4], p. 59.

[68] See Mackenzie, *Roman law* [7], p. 403; Hunter, *Roman law* [4], p. 59.

[69] See supra vol. i, § 371; Speyer, *Le jury à Rome et en Angleterre*, 23 Law Quarterly Review, p. 420.

exercised supreme judicial authority, both criminal and civil, in his province.[70] Each province was divided into judicial districts.[71] And at fixed times the governor held court in the principal towns of the province,[72] traveling on a circuit like some modern English and American judges. The governor had both original and appellate jurisdiction.[73]

Provincial quaestor. Every provincial governor was assisted by a quaestor, who performed the functions of an aedile.[74] § 883

Assessors (adsessores). Frequently it happened that Roman magistrates and court-referees[75] were lacking in legal knowledge, especially as to the forms of procedure: consequently it became the custom to furnish the official administering justice, with advisers or persons learned in the law, who, because they sat near or beside him in court, received the name of "adsessores".[76] § 884

No appellate courts during the Republic. The tribunals of the Republic were independent of each other, for every magistrate theoretically had been endowed with the sovereign power of the people.[77] There was no subordination of courts, and consequently no mode of appealing from the judgment of a lower to a higher court.[78] But there were two partial substitutes for appellate courts: appeals to the people, and the veto of magistrates. § 885

1. Appeal to the people (*provocatio*). A citizen convicted of a serious offense and condemned by a criminal court could appeal to the Roman people assembled in the *comitia centuriata*.[79] The jurist Pomponius states that this right of

[70] Willems, *Id.* p. 370.

[71] Known as *conventus*: Willems, *Id.*

[72] *Conventus agere*: Willems, *Id.*

[73] *Id.* He was assisted by both civil and criminal judices: Willems, *Id.* All his civil judices were recuperatores (defined supra § 881).

[74] Gaius, 1, 6; Willems, *Id.* p. 371. See supra § 878.

[75] Defined supra § 881.

[76] Cicero, *De orat.* 1, 37, *in Verrem*, 2, 19; *Dig.* 1, 22; Willems, *Droit public romain* [7], p. 312; Smith, *Dict. of Gr. and Rom. antiquities* [3], "assessor". These advisers wer also called *consiliarii*: Willems, *Id.*

[77] See Hunter, *Roman law* [4], p. 1044.

[78] The only exception was the provincial governor who exercised a limited appellate jurisdiction in his province, supra § 882.

[79] See supra § 880; Williems, *Id.* p. 299.

(§885) appeal was introduced to limit the authority of the consuls who had inherited the absolute power of the Kings.[80] In later Republican times, after the introduction of permanent criminal tribunals (*quaestiones perpetuae*) with jurors drawn from the citizens, the appeal to the people ceased to be exercised.[81] In the last century of the Republic any Roman citizen, convicted on a criminal charge in a province, could always appeal from the sentence of the governor to Rome.[82] But provincial subjects had no such right: the governor might not only punish them with imprisonment or scourging, but even with death, without appeal.[83]

2. Veto of magistrates (*intercessio*). Inasmuch as each Roman magistrate had been endowed with the sovereign power of the people, any official act of a magistrate might be frustrated by the "veto" ("I forbid") of another magistrate of equal or superior jurisdiction.[84] This veto was called *intercessio*.[85] Any citizen could demand this stopping of the acts of a magistrate, which request was called *appellatio*.[86] This right of veto belonged especially to the tribunes of the plebs, who could exercise it over all magistrates except dictators.[87] The tribune could veto even the acts of a consul or a praetor. Yet a veto did not amend any judicial act, but merely stopped it temporarily.

[80] *Dig.* 1, 2, 2, § 16. But Cicero claims that also during the Monarchy a citizen had this right of appeal: *De republica*, 2, 31. This matter is exhaustively discussed in Willems, *Droit public romain* [7], p. 17, note 4.

[81] Willems, *Id.* p. 307. But the people could pardon convicted criminals: *Id.* p. 103.

[82] Willems, *Id.* pp. 50, 370. See supra § 880.

[83] Willems, *Id.*

[84] *Dig.* 5, 1, 58.

[85] Willems, *Id.* p. 216.

[86] *Id.*

[87] Willems, *Droit public romain* [7], pp. 216, 265–6. See supra §§ 875–7.

(2) Courts and Judicial Officers of the Roman Empire

A. Republican courts and judicial officers continued under the Empire

Consuls. For the first three centuries of the Empire — in other words, during the Early Empire — the consuls were continued as magistrates; and, stripped of all power, they were continued under the Later Empire and in the time of Justinian.[88] During the Early Empire, if not later, they had voluntary jurisdiction of the manumission of slaves and guardianship.[89] As long as the *comitia* and Senate endured, the consuls presided over these legislatures.[90] § 886

The consulship was considered to be the most honorable office of the Empire.[91] The two ordinary consuls were appointed by the Emperor; and their names were published throughout the Empire to serve as a designation for the year in which they held office.[92] The consuls were inaugurated with great pomp and splendor.[93]

Praetors. The number of the praetors was considerably enlarged during the Early Empire[94]; they were finally increased to 18, which was their number in the 2d century of the Empire.[95] But the *praetor urbanus* and the *praetor peregrinus* soon lost their original civil and criminal jurisdiction,[96] and they became virtually aediles or minor judicial § 887

[88] Willems, *Id.* p. 596. Se ,also the *subscriptio* of each of Justinian's prefatory constitutions to the Digest and Code, in which the names of the consuls for the year are recorded.

[89] *Dig.* 1, 10, 1; Willems, *Id.* See supra §§ 434, 436, 522.

[90] Willems, *Id.*

[91] *Cod. Theod.* 6, 6, 1.

[92] *Cod. Theod.* 8, 11, 1–3; Willems, *Droit public romain* [7], p. 536.

[93] Willems, *Id.*

[94] Willems, *Id.* pp. 459, 596.

[95] *Dig.* 1, 2, 2, § 32.

[96] Willems, *Id.* pp. 459, 597. See supra § 877. This was largely transferred to the city prefect (*praefectus urbi*, see infra § 895). The *praetor urbanus* continued, in name at least, until the destruction of the Empire of the West in A. D. 476. The *praetor peregrinus* disappeared after

magistrates.[97] Certain special praetors, like the praetor for guardianship, created during the Early Empire, were more fortunate: their judicial authority descended into the Later Empire and existed in Justinian's time.[98] Thus the title of praetor is found in the latest period of Roman law.

§ 888 **Tribunes of the plebs.** Traces of the tribuneship are found as late as the 5th century A.D.: but this office had then become merely a less honorable dignity of the Later Empire than that of consul.[99] Although during the first century of the Empire the tribunes exercised their right of intercessio or veto,[100] it was employed subject to the Emperor's superior authority;[101] During this period they retained also the right of presiding at sessions of the Senate.[102]

§ 889 **Censors, centumviri, aediles.** The office of censor fell into disuse very early under the Empire, although this title was taken by several Emperors.[103] The centumviral court still existed as late as the latter half of the 2d century A.D., in the time of the jurist Gaius who mentions this court[104]: but then its jurisdiction was probably limited to cases of inheritance. The aediles continued during the Early Empire as late as the reign of Alexander Severus, but they had been transformed into insignificant officials.[105]

§ 890 **Provincial governor (called in the Early Empire variously proconsul, propraetor, praeses, legatus, procurator; called in the Later Empire variously vicar, comes, rector, comes et praeses, dux et praeses, praeses, proconsul).** During the Early Empire some of the provinces were under the control of

A. D. 212 when Caracalla granted Roman citizenship to *all* free inhabitants of the Empire.

[97] Willems, *Id.* See supra § 878.

[98] *Cod. Theod.* 3, 17, 3; *Cod. Theod.* 6, 4, 16; *Dig.* 1, 14; *Code Justin.* 1, 39, 1; *Code*, 5, 33, 1; *Code*, 5, 71, 18; *Nov.* 13, 1, § 1.

[99] Hunter, *Roman law* [4], p. 60. See supra § 876.

[100] See supra § 885.

[101] Willems, *Droit public romain* [7], p. 462.

[102] Willems, *Id.*

[103] The censorship died out 22 B. C.: Willems, *Id.* pp. 455–6.

[104] Gaius, 4, 31. See supra § 879.

[105] Willems, *Droit public romain* [7], p. 461. The last mention of the aedileship is about A. D. 240: Willems, *Id.*

the Senate, and the rest were administered directly by the Emperor.[106] The Senatorial provinces were governed, as in Republican times, by proconsuls or propraetors or, sometimes, by presidents (*praesides*). The provinces of the Emperor were governed by army officers (*legati*, *praesides*, *procuratores*), who combined both civil and military functions. (§ 890)

The provincial governor was a powerful judicial officer, for he had jurisdiction — both civil and criminal — of all lawsuits and prosecutions which were cognizable at the city of Rome by the different courts.[107] The criminal jurisdiction of a governor extended to all persons whether domiciled or not in his province[108]: but his civil jurisdiction was limited to domiciled persons.[109]

The provincial governor was retained as long as the Empire lasted. But the Later Empire was administered differently from the Early Empire. As a result of the labors of Diocletian and Constantine[110] the entire Empire was divided into 4 prefectures, each governed by a *praetorian prefect*.[111] The prefectures were subdivided into 13 dioceses, each governed by a *vicar*.[112] But the governor of the diocese of the Orient was called *comes Orientis*, and the governor of the diocese of Egypt bore the title of *praefectus Augustalis*.[113] The dioceses were subdivided into 117 provinces, each administered by a governor.[114] The usual title of the provincial governor was *rector*.[115] But the governors of the three ancient provinces of Asia, Achaia, and Africa still bore the old familiar

[106] See supra vol. i, § 55; Willems, *Id.* pp. 546–57. There were 12 Senatorial provinces, the older and peaceful ones: Willems, *Id.* p. 547.

[107] Willems, *Id.* pp. 470–1, 550–1, 554.

[108] But the punishment of deportation to an island could not be inflicted by a governor, without consent of the emperor: Hunter, *Roman law* [4], p. 73.

[109] *Id.*

[110] Supra vol. i, § 120.

[111] Treated infra § 896. See Willems, *Droit public romain* [7], p. 600.

[112] Willems, *Id.*

[113] Willems, *Id.* pp. 602–3; *Code*, 1, 37.

[114] Willems, *Id.* p. 604; Hunter, *Roman law* [4], p. 74.

[115] Willems, *Id.*; *Code*, 1, 40.

Republican title of *proconsul*.[116] Infrequently the provincial governor was called also *consularis*, *corrector*, or *praeses*.[117]

But, unlike the Early Imperial provincial governor, the Later Imperial governor had only civil authority: he did not have any military authority (except in a few provinces such as Isauria, Arabia, and Mauretania where the governor was called *comes et praeses* or *dux et praeses*).[118] The Later Imperial governor did not go on circuit to administer justice; he held court at the capital of his province.[119]

§ 891 **Provincial quaestor.** During the Early Empire the jurisdiction of the Republican provincial quaestor was retained in the senatorial provinces.[120]

§ 892 **Quaestiones perpetuae (criminal courts).** In the time of Augustus the *comitia centuriata* or legislature of the people lost its criminal jurisdiction.[121] But the criminal courts known as *quaestiones perpetuae*[122] were retained until during the 3d century of the Empire, when they disappeared.[123] Their criminal jurisdiction was transferred to new magistrates by the Emperors.[124] Even in the lifetime of Augustus had been introduced at Rome the concurrent extraordinary criminal jurisdiction (*cognitio*) of the Senate and of the Emperor.[125]

§ 893 **Judices and assessors.** The judex, both civil and criminal, was retained during the Early Empire. But in the year A.D. 294 the centuries-old practice of referring civil causes for trial by court-referees was abolished by the Emperor Diocletian.[126] The criminal judex disappeared about the same time.[127]

[116] Willems, *Droit public romain* [5], p. 605. The provinces of Asia, Achaia, and Africa were in the dicceses of Asia, Macedonia, and Africa, respectively.

[117] Willems, *Id.*

[118] Willems, *Id.* See *Cod. Theod.*, 9, 27, 3; *Cod. Theod.*, 12, 1, 153.

[119] Willems, *Id.* p. 605; Theophilus, 1, 6, § 4; *Cod. Theod.*, 1, 16, 12.

[120] Willems, *Id.* p. 550. See supra § 883.

[121] Williams, *Id.* p. 465.

[122] See supra § 880.

[123] Willems, *Droit public romain* [7], p, 467.

[124] See infra §§ 895–900.

[125] Willems, *Id.* p. 465.

[126] *Code*, 3, 3, 2–3; see supra §§ 881, 851, 849.

[127] With the disappearance of the *quaestiones perpetuae:* see supra § 892.

The assessors (adsessores), or legal advisers of magistrates and officials, were continued under the Empire, and they still existed in the law of Justinian.[128] The assessors, finally, were paid a regular salary by the State.[129] Justinian required an assessor to abandon the practice of law altogether.[130]

B. NEW COURTS AND JUDICIAL OFFICERS CREATED UNDER THE EMPIRE

§ 894 **Emperor (princeps, Caesar, imperator). Assistance furnished the Emperor by his council of State or consistory (consistorium) and by his chancellor (quaestor sacri palatii).** The supreme judge of the Roman Empire was the Emperor His jurisdiction was both original and appellate.

The Emperor had original jurisdiction — both civil and criminal — of the members of the Senatorial order,[131] and also generally of corporations and the inhabitants of the capital[132]; but usually the Emperor delegated the exercise of this jurisdiction to subordinate officials.[133] Moreover, a petition (*supplicatio*, *preces imperatori oblatae*, *libellus principi datus*) might be addressed to the Emperor by anybody, asking that he either take jurisdiction personally of his case or refer it to some special judge.[134]

The Emperor's appellate jurisdiction was very ample and varied. An appeal (*appellatio*) to him could generally be

[128] The duties of an assessor are thus stated by the jurist Paulus in *Dig.* 1, 22, 1: "Omne judicium adsessoris, quo juris studiosi partibus suis funguntur, in his fere causis constat: in cognitionibus, postulationibus, libellis, edictis, decretis, epistulis." See *Code*, 1, 51, 1, 2 and 7; Willems, *Id.* pp. 370, 605.

[129] Lampr. *Alex. Sev.*, 46; Smith, *Dict. of Gr. and Rom. antiq.*[3], "assessor".

[130] *Code*, 1, 51, 14.

[131] Willems, *Droit public romain*[7], p. 586.

[132] *Code*, 1, 28, 4; *Code*, 11, 17 (16), 2; Willems, *Id.*

[133] Willems, *Id.* See infra §§ 895–9.

[134] See *Code*, 1, 20, 1. Generally the Emperor would then order his chancellor (*quaestor sacri palatii*) to prepare a rescript, with which the petitioner went before the special delegated judge, who then notified the opposite party of the libel brought before him: see Willems, *Id.* p. 639.

(§894) taken from any important subordinate court.[135] This appeal the Emperor either decided personally or delegated its decision to a special judge (*judex delegatus*[136]).

The Emperor also, in difficult cases, could give an opinion (*rescriptum*, *epistula*) at the request of any subordinate judge or sometimes even of a litigant.[137] If the case was a criminal one involving a serious offense, the Emperor frequently delegated his decision to the Senate or the praetorian prefect or some other high official of State.[138] This practice of referring a case (*relatio*, *consultatio*) to the Emperor endured for centuries, until abolished by Justinian.[139]

Augustus established a council (*consilium principis*), composed of Senators and knights (equites) selected according to his pleasure, for the purpose of assisting him in the exercise of his authority, including his judicial jurisdiction.[140] Subsequently this council was endowed with a fixed organization by Hadrian.[141] It met, from the time of Marcus Aurelius, in the *auditorium* of the Imperial palace.[142] The reports and decisions of the Emperor's council were productive of an effect similar to the modern British orders of the King in Council.[143]

In the middle of the 4th century this Imperial council received the name of *consistorium*. It was then composed of the highest officers of State attached to the Imperial palace.[144] It assisted the Emperor in the exercise of his administrative, legislative, and judicial powers.[145] It existed in the time of Justinian.

[135] *Cod. Theod.* 11, 30, const. 3, 8, 11, 13, 16, 23, 29–30, 44, 61–2; *Cod. Theod.* 11, 34, 2; *Code Justin.* 7, 62, const. 2, 23 and 38; *Nov.* 23, 3; Willems, *Droit public romain*[7], p. 637. See infra §§ 895–900, 904.

[136] See *Cod. Theod.* 11, 30, 16; Willems, *Id.* p. 638.

[137] *Cod. Theod.* 11, 29, 1; *Cod. Theod.* 11, 30, 55; *Cod. Theod.* 9, 21, 2, § 3; *Cod. Theod.* 9, 40, 10; *Code Justin.* 12, 1, 16; Willems, *Id.* p. 638.

[138] Willems, *Id.* pp. 595, 638.

[139] *Nov.* 125.

[140] Willems, *Droit public romain*[7], p. 469.

[141] *Id.*

[142] *Dig.* 36, 1, 23 (22), pr. See also *Dig.* 23, 3, 78, § 4.

[143] Williams, *Inst. of Justinian*[2], p. 43.

[144] Willems, *Id.* pp. 575–7.

[145] Willems, *Id.* p. 639.

During the Later Empire was created the Imperial chancellor (*quaestor sacri palatii*) whose duties included the preparation of projected laws, the receiving of petitions addressed to the Emperor, and the countersigning of laws, edicts, and rescripts issued by the Emperor.[146]

City prefect (praefectus urbi). This official was a trans- § 895
formed Republican magistrate.[147] Originally established by Augustus to maintain order and safety in the city of Rome,[148] this minister of State soon acquired other functions (especially those belonging to the Republican praetors and aediles[149]), and finally became — next to the Emperor — the supreme civil and criminal magistrate during the first centuries of the Early Empire.[150] His criminal jurisdiction comprised not only the city of Rome, but also extended 100 miles beyond Rome.[151] An appeal lay from him to the Emperor.[152]

During the Later Empire the city prefect was continued, but his importance declined in favor of the newer praetorian prefect[153] who judicially became his superior — an appeal could be taken to the praetorian prefect from the judgment of the city prefect.[154]

Praetorian prefect (praefectus praetorio). This officer § 896
originally was created by Augustus.[155] His duties were at first purely military: the praetorian prefect was an Imperial aide-de-camp and commander of the bodyguard of the Emperor. The number of the praetorian prefects, of which there were two in Augustus' reign, subsequently varied from one to four.[156] By reason of their proximity to the Emperor's person the

[146] *Cod. Theod.* 6, 9; *Code Justin.* 1, 30; Willems, *Droit public romain*[7], pp. 577–8.

[147] Willems, *Droit public romain*[7], pp. 240, compare pp. 170, 239, note 8.

[148] Tacitus, *Ann.* 6, 11; Suetonius, *Aug.* 37; Willems, *Id.* p. 501.

[149] See supra §§ 887, 889.

[150] Willems, *Id.* pp. 470–71, 502, 545. See *Dig.* 1, 12, 1, §§ 1, 7–8, 14.

[151] *Coll. Mos. et Roman. legum*, 14, 3, § 2; *Dig.* 1, 12, 1, § 4.

[152] Dio Cass., 52, 33; *Dig.* 4, 4, 38; see *Dig.* 45, 1, 122, § 5; Willems, *Id.* p. 502.

[153] *Dig.* 1, 11; *Code*, 1, 26, 27; *Code*, 12, 3.

[154] Willems, *Id.* p. 637.

[155] Willems, *Droit public romain*[7], p. 430.

[156] Willems, *Id.* p. 431.

praetorian prefects gradually drew to themselves other powers not military at all, including much civil and criminal jurisdiction. Finally, in the 3d century A.D., the praetorian prefect became a greater minister of State than the city prefect,[157] and for the remainder of the Early Empire and during the Later Empire the praetorian prefecture constituted — next to the Emperor — the highest court of the Roman Empire. Three of the greatest Roman jurists — Papinian, Paulus, and Ulpian — were praetorian prefects.[158]

All Italy beyond 100 miles from the city of Rome was subject to the criminal jurisdiction of the praetorian prefect.[159] Appeals, both civil and criminal, lay from all provincial governors to the praetorian prefect.[160] Although originally there was no appeal from the judgments of the praetorian prefect,[161] yet from the 4th century onward it became possible to review their judgments by a petition to the Emperor.[162] The praetorian prefects exercised a general supervision over inferior judges, and could remove them if necessary.[163]

Constantine divided the Roman Empire into four praetorian prefectures: in the East, the Orient (capital, Constantinople) and Illyria (capital finally, Thessalonica); in the West, Italy (capital, Milan) and Gaul (capital finally, Arles).[164] But the same Emperor also abolished the military jurisdiction of the praetorian prefects.

§ 897 **Prefect of police (praefectus vigilum).** This officer was created by Augustus to have charge of the police of the city of Rome.[165] Subsequently the prefect of police came to acquire a minor criminal and civil jurisdiction.[166] An appeal could

[157] See supra § 895.

[158] See supra vol. i, §§ 98–9, 108; *Dig.* 12, 1, 40.

[159] *Coll. Mosaic. et Roman. legum*, 14, 3, 2. See *Dig.* 1, 12, 1, § 4.

[160] *Code*, 9, 2, 6; *Code*, 7, 62, 32. See *Dig.* 12, 1, 40; *Dig.* 22, 1, 3, § 3.

[161] *Cod. Theod.* 11, 30, 16; *Code Justin.* 7, 62, 19; *Dig.* 1, 11, 1, § 1.

[162] *Cod. Justin.* 1, 19, 5; *Code.* 7, 42; 7, 62, 30 and 35; *Nov. Theod.* 13; *Nov. Justin.* 82, ch. 12; Willems, *Droit public romain*[7], p. 637.

[163] Willems, *Id.* p. 432.

[164] Willems, *Id.* p. 600.

[165] Willems, *Id.* 503.

[166] *Dig.* 1, 15, 3, §§ 1 and 4; *Dig.* 12, 4, 15; *Dig.* 47, 2, frag. 57 (56), § 1; *Dig.* 19, 2, 56; *Dig.* 20, 2, 9; Willems, *Droit public romain*[7], pp. 370, 470, 476, 502.

be taken from the prefect of police to the city prefect or to the Emperor.[167]

Prefect of food-supplies (praefectus annonae). Late in the reign of Augustus the provisioning of the city of Rome, the supervision of the grain market in order to prevent extortionate prices, and the monthly gratuitous distribution of food-supplies to the citizens were delegated to an official who came to receive the title of *praefectus annonae*.[168] And in course of time the prefect of food-supplies acquired a minor criminal and civil jurisdiction.[169] An appeal could be taken from the praefectus annonae to the city prefect.[170] § 898

Rationales; procurator Caesaris. Suits or litigation to which the Imperial treasury (fiscus) was a party were generally tried before a tribunal known as *rationales*,[171] the treasury being represented by an advocate.[172] During the Early Empire the supervision of the collection of taxes in the provinces was under the charge of the Imperial treasury agent (*procurator Caesaris*), who usually heard cases involving the treasury or the collection of revenue.[173] § 899

Defenders of cities (defensores civitatum). These were provincial city or municipal magistrates of the Later Empire; they were created in A.D. 364–5 by the Emperor Valentinian I.[174] They had a petty civil and criminal jurisdiction.[175] From their decisions appeals could be taken to the provincial governor.[176] § 900

Permanent petty judges (judices pedanei). These judicial officers are mentioned in Diocletian's statute abolishing the § 901

[167] Willems, *Id.* pp. 503, 586, 587, 636.

[168] Willems, *Id.* pp. 505, 486. See Sherman, *The maritime law of Rome, etc.*, pp. 16, 19, 21.

[169] *Dig.* 48, 2, 13; *Dig.* 14, 1, 1, § 18; Willems, *Id.* pp. 470, 476, 506.

[170] Willems, *Id.*

[171] *Cod. Theod.* 11, 30, 41; *Code Justin.* 3, 22, 5; *Code Justin.* 2, 8, (9); Willems, *Id.* p. 632.

[172] See *Code*, 2, 7, const. 10 and 23, § 1; see infra § 906.

[173] Willems, *Droit public romain*[7], pp. 495–6, 550; Hunter, *Roman law*[4], p. 72.

[174] *Cod. Theod.* 1, 29, 1 and 2; *Code Justin.* 1, 55.

[175] *Code*, 1, 55, 1 and 3; *Nov.* 15, ch. 6; *Cod. Theod.* 1, 29, 7; Willems, *Id.* pp. 613–15. See infra §§ 910–11.

[176] *Code*, 7, 62, 5; *Code*, 10, 32 (31), 2; *Nov.* 15, ch. 5; Willems, *Id.* p. 636.

Early Imperial formulary procedure.[177] During the Later Empire they relieved the regular judges of courts by hearing petty cases delegated to them for trial.[178] From their decisions appeals could be taken to the provincial governor.[179]

§ 902 **New criminal courts.** As the Republican criminal courts decayed,[180] criminal jurisdiction was assumed by the Emperor, the various prefects, and the provincial governors, and other magistrates.[181]

§ 903 **Ecclesiastical courts, particularly the bishop's court (episcopalis audientia).** From the time of Constantine, the Later Empire had also ecclesiastical courts, both Christian and Jewish.[182] The Catholic bishops were invested with a double jurisdiction: ecclesiastical cases, and secular or civil cases which the parties voluntarily submitted for their decision.[183] Among the civil functions of the bishop's court (*episcopalis audientia*) was the appointment of guardians.[184]

§ 904 **Appeals allowed during the Empire. The Imperial appellate courts.** Very ample provision was made under the Empire for the carrying of appeals from any subordinate court to a higher court. If the case was important enough, an appeal could be taken either to the praetorian prefect or even to the Emperor himself. The provincial governor served as a court of appeal for decisions made by local or city or petty magistrates; from the governor an appeal could be taken either to the vicar of the diocese or (in Italy) to the city prefect, or to the praetorian prefect; from the decisions of the vicar, city prefect, or praetorian prefect an appeal lay to the Emperor.[185]

[177] *Code*, 3, 3, 2.

[178] *Code*, 2, 7, 25; *Code*, 3, 3; Willems, *Id.* p. 633.

[179] Willems, *Id.* p. 636.

[180] Supra § 892.

[181] See supra §§ 894–900.

[182] *Code Justin.* 1, 4; *Cod. Theod.* 2, 1, 10; Willems, *Droit public romain*[7], p. 632.

[183] *Code*, 1, 4; supra vol. i, § 149; Willems, *Id.*

[184] *Inst.* 1, 20, 5. See supra vol. i, §§ 149–52.

[185] See supra §§ 870, 894–901, Willems, *Droit public romain*[7], pp. 636–7.

(3) Places and Times of Holding Roman Courts

§ 905 **Places where Roman courts were held. The days lawful or unlawful for judicial proceedings. Holidays.** Originally in the city of Rome the courts were held in the Forum or Comitium. But, early in the 2d century B.C., courthouses, called *basilicas*,[186] began to be erected for the use of magistrates, which subsequently served as the model for Christian churches. Sometimes a court might be held in a closed building, *secretarium* or *auditorium*, instead of in a basilica which was open to the weather:[187] but the proceedings must ordinarily take place with the doors open to the public,[188] and the judge should not be screened off from the spectators.[189]

During the Republic and the Early Empire, days when the courts were open and it was lawful to administer justice were known as *dies fasti*.[190] This portion of the year, which was

[186] A Roman basilica may be described as a large colonnade of great breadth, depth, and height, partially enclosed on one or more sides and originally without a roof. It contained a gallery for spectators. In course of time the name of basilica was given to all sorts of public halls, closed (roofed-in) or otherwise, connected with temples, theaters, or baths: see Smith, *Dict. of Greek and Rom. antiq.*[3], vol. i, "basilica". The first basilica was erected 184 B. C. and was situated in the Forum, being called the Basilica Porcia after its founder M. Porcius Cato: Livy, xxxix, 44, 7; see xxvi, 27, 3. There were also erected, at different times, at Rome, 20 other basilicas, the most important of which were the Basilica Julia (restored by Augustus), the Basilica Flavia, and the Basilica of Constantine: Smith, *Id.* The jurist Paulus related that the courts were held in basilicas: *Sent.* 4, 6, 2.

[187] See footnote immediately preceding.

[188] *Cod. Theod.* 1, 16, 9.

[189] *Cod. Theod.* 1, 16, 7.

[190] Prior to Cnaeus Flavius' disclosure of the calendar of days when it was lawful for the courts to sit, which occurred about the year 304 B. C., knowledge of the judicial calendar was confined to the college of priests (*pontifices*, — see supra vol. i, §§ 45, 68). In the Roman law prior to Marcus Aurelius there were 40 "dies fasti" in each year; there were also 190 days when courts might sit if there was no legislative assembly in session or no popular election in progress.

open to judicial proceedings in litigation, was also called by the Emperor Marcus Aurelius *dies juridici* or *dies judiciarii*.[191]

Days when the courts were closed and it was unlawful for them to exercise their functions, were known as *dies nefasti*.[192] These corresponded to the *dies non juridici* or *dies non* of Anglo-American law. On holidays (*feriae, imperiales, solemnes*) Roman courts did not sit.[193]

In the Later Empire, from the end of the 4th century, litigation might be prosecuted before the courts during the entire year, except Sundays, holidays,[194] the Easter recess, and the long vacation of the courts in harvest time.[195] And this was true also of the Justinian law.

(4) THE ROMAN BAR

§ 906 **Origin of the legal profession at Rome. Admission to the bar. Advocates in full practice and the supernumeraries. Imperial Treasury or Fiscal advocates. Fees. The part played by the lawyer in the Roman world.** The origin of the Roman advocate is traceable to the relation of patron and client which came into existence very early at Rome.[196] In ancient times the *patronus* was a patrician (a member of the educated class) who had some dependent plebeians (known as *clientes*) to protect,[197] one of the patron's duties being the representing of a client in courts of justice and the conducting

[191] There were 230 such days. The remainder of the year also was available for litigation if the parties consented: *Dig.* 2, 12, 1, § 1; *Dig.* 2, 12, 6.

[192] In Roman law prior to Marcus Aurelius there were 60 such "dies nefasti" in each year; there were also certain other days, when only a prescribed part of the day was available for judicial proceedings. But although magistrates could not sit on "dies nefasti", a court-referee (*judex*, defined supra § 849) could: see Hunter, *Roman law* [4], p. 52.

[193] Holidays were either periodical or occasional. Among the periodical holidays (*solemnes*) were the last day of December, January 3 (*Dig.* 2, 12, 5; *Dig.* 50, 16, 233, § 1), and the time of sowing and of harvest (*Dig.* 2, 12, 4). Occasional holidays (*feriae repentinae*, later known as *imperiales*, see *Code*, 3, 12, 3) were proclaimed because of some great public rejoicing or sorrrw.

[194] These included the January holidays, the anniversaries of the founding of Rome and Constantinople, Christmas, Epiphany, and Easter.

[195] *Code*, 3, 12, const. 6 (7) and 7 (8).

[196] See Colquhoun, *Roman law*, §§ 329, 495, 2009, 2209.

[197] Supra § 439.

of his lawsuits for him.[198] In return for the patron's services, (§ 906) which were gratuitous, the client had to perform certain duties for the benefit of the patron.

But in course of time this ancient system of patronage (*patronatus*) fell into disuse; and it became possible for anyone, needing a counsel in court or desiring legal advice, to obtain or consult whomsoever he wished. And it soon became the custom for such clients to give a fee (*honorarium*) in lieu of the old services performed in ancient time. Down to the end of the Republic the person who acted in court for another or spoke in his behalf was called either by the ancient name of "patronus" or by the later names of "orator" and "advocatus"[199]; but such counsel did not have to be a professional advocate.

Prior to the 3d century B.C., the profession of a lawyer or jurist did not exist. But about the middle of this century Tiberius Coruncanius, the first plebeian pontifex maximus, inaugurated the practice of giving public consultations to persons needing legal advice[200]: this event soon led to the development of a new class of public men, not priests at all, who professed to be skilled as to knowledge of the law and who could be consulted on legal matters.[201] Such legal advisers finally received the name of *jurisconsults*.[202]

Under the Empire the term "advocate" was usually employed to designate a person acting in court for a client and speaking in his behalf.[203] Nevertheless the old familiar Republican name of "patron" was still retained to refer to an advocate intrusted with the suit of a litigant. But although this class of professional men was also called *patroni*

[198] Dionysius of Halicarnassus, 2, 10; Mommsen, *Röm. Staatsrecht*, book iii, 7 (on the clientes); Colquhoun, *Roman law*, § 495; Mackenzie, *Roman law*[7], pp. 441, 444.

[199] During the Republic the term "advocatus" was used to designate a friend who went with a litigant into court to advise him. Unlike the orator or patronus, usually the advocatus did not speak for the litigant: Smith, *Dict. of antiquities*[3], vol. i, "advocatus."

[200] See vol. i, § 45.

[201] *Id.*

[202] *Id.*

[203] See supra § 855.

(§906) or *causidici*, these terms were finally used in the same sense as *advocati*.[204]

During the Empire the Roman bar became organized into a profession. Admission to the bar became a matter of State regulation. Admission to the bar was refused to all persons under seventeen years of age,[205] to all infamous persons,[206] and to women.[207]

Why this *exclusion of women* became a provision of Roman law is thus related by the jurist Ulpian: "The praetor . . . forbids women to act as counsel for others. And the reason for this prohibition is, that for women to mix themselves in other people's lawsuits and to perform duties fit only for men is contrary to the modesty becoming their sex: the origin of this prohibition was occasioned by a most brazen woman named Carfania,[208] who so troubled a magistrate by her shameless conduct in court as to necessitate the placing of this prohibition in the Edict."[209] This exclusion of women as advocates for others was also a feature of the latest Roman law, that of Justinian. But women were always allowed to be their own lawyers.[210] And Roman writers make mention of three women who were celebrated for their legal knowledge:

[204] In the reign of Claudius (A. D. 41–54) the terms "patronus" and "advocatus" are now used interchangeably: see Tacitus, *Ann.* xi, 7. There is also a rescript of Valentinian and Valens, dated A. D. 368, which, while forbidding anyone to be both judge and advocate in the same suit, uses synonymously all three terms referring to the bar: *Code*, 2, 6, 6, pr. ("Quisquis vult causidicus non in eodem negotio sit advocatus et judex, quoniam aliquem inter arbitros et patronos oportet esse delectum").

[205] "Minorem annis decem et septem, qui eos non in totum complevit, prohibet postulare": *Dig.* 3, 1, 1, § 3.

[206] *Dig.* 3, 1, 1, §§ 5–8, 10–11. Included in this class were persons punished by a deprivation of the privilege of acting in court as advocate for others: see *Dig.* 48, 19, 9, pr., and §§ 1–8; *Dig.* 3, 1, frag. 6, § 1, frag. 8. But an infamous person might ordinarily act as his own counsel: *Dig.* 3, 1, 1, § 8. Infamy is treated supra § 453.

[207] *Dig.* 3, 1, 1, § 5.

[208] Her name is given also as Cafrania or G. Afrania. She was the wife of Licinius Buccio, a Roman Senator: Mackenzie, *Roman law* [7], p. 462.

[209] *Dig.* 3, 1, 1, § 5.

[210] *Dig.* 3, 1, 1, §§ 5 and 7. See also supra § 855.

Hortensia (the daughter of the great orator Q. Hortensius), (§906)
Amasia, and Eugenia.[211] Mental capacity for the acquisition of legal knowledge is not limited to men alone.

During the Later Empire and in the time of Justinian a five years course of legal studies was required of all candidates for the bar.[212] Applications for admission were considered at a hearing held before the governor of the province[213]; at this hearing the character of each candidate was investigated,[214] evidence that the candidate had studied law for the prescribed number of years was presented,[215] and the candidate's certificates from his professors or instructors attesting his proficiency of legal knowledge were produced[216]; if every-

[211] See Mackenzie, *Roman law*[7], pp. 462–3; Fuller, *The French bar*, 23 Yale Law Journal, p. 262.

[212] *Const.* "Omnem" (second preface to the Digest), §§ 2–5; *Inst.*, "Prooemium" (Preface), § 3; Roby, *Introduction to the Digest*, p. xxvi. For the details of the prescribed 5 years course, see supra vol. i, §§ 156–61.

[213] Where each candidate was born: *Code*, 2, 7, 11, § 1.

[214] Moreover each candidate must be a Christian and a Catholic: *Code*, 2, 6, 8; *Code*, 1, 4, 1 and 15. Candidates "cujuslibet deterioris condicionis" or who were "cohortales" (municipal officials, — *decuriones*) were excluded from the profession of advocate: *Code*, 2, 7, 11, § 1; 17, pr.; *Cod. Theod.* 8, 4, 30.

[215] "Nec de cetero quemquam, antequam *per statuta tempora* legum eruditioni noscatur inhaesisse, supra dicto consortio sociari": *Code*, 2, 7, 22, § 4, — anciently cited *Code*, 2, 8, 3, § 4 (Anastasius, A. D. 505). This provision is also repeated in *Code*, 2, 7, 24, § 4, anciently cited *Code*, 2, 8, 5, § 4, (same Emperor and date).

[216] "Non aliter vero consortio advocatorum tuae sedis aliquis societur, nisi prius in examine viri clarissimi rectoris provinciae, ex qua oriundus est, praesentibus cohortalibus gesta conficiat, quibus aperte pateat cohortali statui ac fortunae eundem minime subjacere . . . Juris peritos etiam doctores eorum jubemus juratos sub gestorum *testificatione* depromere, esse eum, qui posthac subrogari voluerit, peritia juris instructum": Code, 2, 7, 11, §§ 1–2 (Leo, A. D. 460). "Neque quisquam apud P. P. advocatus sit, nisi prius apud Rectorem provinciae, ex qua oriundus est, . . . in acta relatum fuerit eum cohortali fortunae minime subjacere. Juret etiam doctor ejus sub gestorum *testificatione*, eum jurisprudentiae accuratam operam navasse . . . SCHOLIUM (doctor, etc.). Non omnes ejus loci Antecessores, sed tantum ejus magister": *Basilica*, 8, 1, 26. See also *Code Justin.* 2, 7, const. 17, pr., (A. D. 474); const. 22 (also formerly cited *Code*, 2, 8, 3), §§ 4–5, A. D. 505; const. 24 (also formerly cited *Code*, 2, 8, 5), §§ 4–5; supra vol. i, § 163.

§ (906) thing was found to be satisfactory,[217] the candidate was then admitted to the bar.

But during the Later Empire, including Justinian's time, the bar was divided into two sections: the advocates in full practice, and those on the waiting-list (*supernumerarii*[218]). Only a limited number of advocates was allowed to practise in each superior tribunal.[219] Their names were inscribed on the register of court (*matricula fori*) kept for this purpose.[220] The matriculated advocates formed a corporation and enjoyed special privileges[221]; but they were subject to a special discipline, as to their duties.[222]

In the first rank of such advocates were the Imperial Treasury or Fiscal advocates (*advocati fisci*).[223] These officials originally were introduced by the Emperor Hadrian.[224] The fiscal advocates had charge of the legal business of the Imperial Treasury, including suits connected with the collection of the revenue.[225] Their functions were quite similar to those of the English solicitors of the Treasury. And Blackstone says that the select class of barristers in England known as King's or Queen's counsel "answer, in some measure, to the advocates of the revenue, *advocati fisci*, among the Romans." [226]

[217] Mackenzie's statement, that candidates were "also required to pass a public examination previous to admission" (*Roman law*[7], p. 448), is not supported by any text of Roman law; and the text which he cites ("*Dig.* Praef. Prim. Const. 2") is irrelevant and no authority at all.

[218] This word is used in *Code*, 2, 7, frag. 11, § 1, frag. 13.

[219] For instance the advocates authorized to practise before the praetorian prefect of the East was 150 (*Code*, 2, 7, 8 and 11); the same number was allowed at the court of the praetorian prefect of Illyria (*Code*, 2, 7, 17); at Alexandria only 50 were allowed (*Code*, 2, 7, 13). For the number of advocates allowed in other courts, see *Code*, 2, 7, const. 22, pr., const. 24, pr., const. 26, pr.

[220] "Matriculis . . . inserti": *Code*, 2, 7, 20, § 1; see Willems, *Droit romain public*[7], p. 633.

[221] "Corpore togatorum": *Code*, 2, 7, 3. "Advocatorum corpori": *Code*, 6, 48, 1, § 10, and *Bas.* 44, 18, 29. See *Code*, 2, 7, 6; *Nov. Theod.* 10, 1.

[222] *Code*, 2, 6, const. 5, const. 7; *Code*, 2, 7, §§ 2–3; *Code*, 3, 1, 13, § 9; *Code*, 8, 35, (36), 12; *Cod. Theod.* 2, 10, 4.

[223] How the seniors of the advocates were privileged to enjoy these offices, see *Code*, 2, 7, const. 8, const. 23, § 1, const. 12–13, const. 16, const. 22, § 5.

[224] Spartian, *Had.* 19–20.

[225] *Code*, 2, 8; *Dig.* 28, 4, 3. See supra § 899.

[226] *Comm.* vol. iii, p. 27.

Supernumerary Roman advocates on the waiting-list were admitted to the section of advocates in full practice, only when vacancies[227] in its membership occurred; and then the sons of members were preferred to other supernumeraries.[228] But the supernumerary advocates were allowed to practice before certain inferior courts.[229] (§ 906)

Originally under the Republic the services of a representative in court were gratuitous. But, after the breakdown of the system of patronage, remuneration and presents were customarily given by clients to persons who acted for them in court. Soon the latters' exactions pressed so heavily on clients as to constitute an abuse. Consequently, in the year 204 B.C., a law, the *lex Cincia*, was passed prohibiting any one from receiving a fee or gratuity for advocating the cause of another in court.[230] But this statute, which provided no penalty for its contravention, became more honored in the breach than in the observance. The practice of giving of fees to advocates continued down to the end of the Republic. Some of the fees given were notoriously large. Even Cicero, who always professed the greatest respect for the Cincian law, is suspected of having received a huge fee disguised as a loan.[231]

With the advent of the Empire, Augustus endeavored to revive[232] the ancient law prohibiting the receipt of fees. But this injudicious regulation did not suppress the practice of receiving fees; and in the time of Claudius (A.D. 41–54) the principle of a fee (*honorarium*) obtained admission into Roman jurisprudence. By a law enacted in the reign of

[227] *Code*, 2, 7, 11, § 2, and next footnote.

[228] *Code*, 2, 7, frag. 11, § 2, frag. 13, pr., frag. 22, § 5, frag. 24, § 5; *Bas.* 8, 1, 26.

[229] Mackenzie, *Roman law*[7], p. 448.

[230] Tacitus, *Ann.* 11, 5.

[231] This is Mackenzie's interpretation of the sum of nearly $40,000 which Cicero received from Publius Sylla who was impeached: *Roman law*[7], p. 445. Another way to reward a lawyer was to leave him a legacy: if Cicero is to be believed, he received over $800,000 in legacies (Mackenzie, *Id.* p. 446).

[232] Dio Cass., liv. 18. A senatusconsultum of the year 17 B. C. punished the guilty advocate by a sum four times the amount received.

(§906) this Emperor no fee must exceed 10,000 sestertia [233] (about $400). Under Nero new regulations were made, but the same maximum amount — represented by 100 aurei — was still continued.[234] And this maximum of 100 aurei descended into the law of the Later Empire and of Justinian.[235]

In the reign of Trajan it was enacted that payment of the honorarium or fee should not be made until judgment was rendered in the case[236]; but in the law of Justinian it was legal to make payment before judgment.[237] If an advocate who had received a fee to conduct a case failed to do so, he was not bound to return the fee unless the failure to conduct the case was his fault.[238]

An agreement with a client that remuneration for conducting his lawsuit should be a certain portion of the proceeds (*pactum de quota litis*) was forbidden[239]: an advocate making such an agreement was disbarred.[240] This Roman prohibition, designed to uphold the honor of the legal profession, has exerted a strong influence in modern law: for instance the Anglo-American Common Law has made it a criminal offense, known as champerty, for a lawyer to agree to carry on a suit and take as his remuneration a part of the proceeds.[241]

The pecuniary right of a Roman advocate was always considered to be of an honorary nature — a reward for services not properly calculable; and not until the 3d century A.D., in the reign of Alexander Severus, did advocates obtain the right to bring suit for the payment of fees (honoraria).[242]

[233] Tacitus, *Ann.* 11, 7.

[234] Suet., *Nero*, 17. See also Tacitus, *Ann.* xiii, 5 and 42.

[235] *Dig.* 50, 13, 1, § 13.

[236] Pliny, v, 21. See *Dig.* 50, 13, 1, § 12; *Code*, 12, 62.

[237] See *Dig.* 19, 2, 38, § 1; *Code*, 4, 6, 11.

[238] *Id.*

[239] *Dig.* 2, 14, 53; *Dig.* 17, 1, 7; *Code*, 4, 35, 20. See *Dig.* 50, 13, 1, § 12. But a loan of money to support a lawsuit was valid: *Id.*

[240] Mackenzie, *Roman law*[7], p. 446.

[241] Blackstone, *Comm.*, vol. iv, p. 135; Clark, *Criminal law*, pp. 322–3; *Lancy* v. *Havender*, 146 Mass. 615. But the crime of champerty is not recognized or has been materially modified in many American states: Clark, *Id.* p. 324.

[242] *Dig.* 50, 13, 1, § 10. This action was extraordinary (*extra ordinem*): see supra § 850.

The Roman judges were recruited, like their modern brethren, from the ranks of the legal profession. The part played by the lawyer in the Roman world was very important. The State could not get along without them. And it is not strange that Justinian admonished the professors of the Roman law schools to thoroughly instruct their students in the knowledge of the law "in order that they may become the best ministers of justice and of the State." [243]

No greater tribute to the legal profession has ever been given than the following praise bestowed upon it by the Emperors Leo and Anthemius: "The lawyers who clarify the ambiguous facts of litigation, and who by the strength of their defensive skill exhibited in both criminal and civil suits rescue other persons in danger of ruin and restore their fortunes, are not less useful to the world than soldiers who serve their country and their homes on the battlefield. We consider that not only soldiers but also lawyers are fighting battles in our State: for the lawyers, wielding the weapon of eloquence, protect the hopes and lives of persons in distress and their children." [244]

(5) Roman Notaries

The Roman notary the ancestor of the modern notary. § 907 During the Early Empire was evolved the special agent or officer whose business was the reduction to writing and the recording of transactions of parties.[245] This Roman officer — known as *tabellio*, *tabularius*, *notarius*[246] — was virtually a

[243] Const. "Omnem," second preface to the Digest, § 11 (Monro).

[244] *Code*, 2, 7, 14 (A. D. 469).

[245] Laborderie-Boulou, *Recherches sur les origines de la responsabilité notariale*, 36 Revue gén. du droit, pp. 385–93.

[246] The original meaning of all these terms (and others) is thus defined by Savigny in his *Geschichte d. röm. Rechts im Mittelalter*, vol. i, § 16: "During the Republic, and down to the age of the great jurisconsults (Early Empire), **scriba** was the name generally given to those who copied public acts (*Dig.* 50, 4, 18, § 17; *Code*, 7, 62, 4). The copyist, slave or paid a salary, working for another was called **exceptor** (*Dig.* 19, 2, 19, § 9). **Actuarius** and **notarius** (*Dig.* 50, 13, 1, § 6) mean the same, except that *notarius* designates a special sort of writing. In the 4th and 5th centuries (the Later

(§907) State official, as is also the modern Continental European notary. Furthermore the Roman notary in many respects closely resembles the English and the American notary.[247]

The Roman notaries were organized into a corporation.[248] The chief duties of Roman notaries were the preparation of legal documents,[249] the framing of libels or complaints for the commencement of lawsuits,[250] and the drafting of wills.[251] And although the Imperial Roman law never made notaries civilly responsible for incompetent acts, yet it did punish them criminally — sometimes in a cruel manner.[252]

The Roman notary was the ancestor of the modern notary.[253] The Digest and Code of Justinian revealed to the medieval Civilians a state of society where special agents prepared documents. From the Roman law texts the famous Italian founder of the Bologna school of the Glossators, Irnerius, derived and introduced the modern conception of a notary.[254]

Empire), the language had completely changed. *Exceptor* was the name generally given to all persons recording public acts. The *Notitia dignitatum* shows that *exceptores* were attached to all governmental bureaux (*officia* see *Cod. Theod.* 8, 7, 17; *Code Justinian*, 12, 49 (50), 5). The senate of each city has its *exceptor* (*Cod. Theod.* 12, 1, 151; *Nov. Theod.* 23), and the copyists of the courts bear the same name (*Code*, 12, 19, 12, § 1). The title of *notarius* was then reserved for the secretaries of the Emperor, classified among themselves by their rank and employment: those in the first rank were the *tribuni* and *notarii*, who compiled the lists of officials and kept accounts. Finally the **tabelliones** (used in *Inst.* 3, 23, pr.) were the notaries of modern times, that is to say, persons who, without being public officers, drew up transactions, wills, etc. At the commencement of the 6th century they were called **amanuenses** or **cancellarii** (Interpretatio, *Cod. Theod.* 9, 19, 1: "Tabellio vero; qui amanuenses nunc vel cancellarius dicitur"). For the subsequent use of all these Roman terms in still later centuries, see Savigny, *Id.* § 106. The term **tabularius** is used, like *tabellio*, in *Inst.* 1, 11, § 3; *Code*, 10, 71; *Dig.* 50, 13, 1, § 6; *Code*, 6, 22, 8, § 1b.

[247] See Williams, *Inst. of Justinian* [2], pp. 28–9.

[248] Williams, *Id.* p. 29. See *Code*, 10, 71.

[249] *Code*, 4, 21, 17; *Nov.* 73, ch. 5; supra § 659, fifth footnote.

[250] *Dig.* 48, 19, 9, §§ 4–7. The libel is treated supra § 853.

[251] Particularly the wills of the blind: *Code*, 6, 22, 8, §§ 1b and 2.

[252] For instance see *Code*, 11, 54 (53), 1, § 1; *Code*, 1, 2, 14, 6 (3).

[253] Laborderie-Boulou, *Note sur l'origine de la force probante de l'acte de notariété*, 38 Revue gén. du droit, pp. 60–62.

[254] Laborderie-Boulou, *Recherches*, etc., 36 Revue gén. du droit, pp. 387. As to Irnerius, see supra vol. i, § 213.

Two centuries later, Bartolus, the greatest of the Italian Commentators, fully developed the Continental European doctrine of notarial responsibility for incompetence or negligence; and his pupil Baldus amplified the details of this doctrine.[255] During the 12th century the French *notariat* was developed in southern France; and very early in the following century the notion of an *acte autentique* existed in Montpelier.[256] In the same century, the 13th, the *notariat* spread to the northern provinces of France. And now this institution exists throughout the modern world. But the notary in Great Britain and the United States is a far less important official than the Continental European notary.

2. MUNICIPAL CORPORATIONS

Introduction. Roman municipal corporations, commonly called towns (*oppida*, *vici*, *castella*, *pagi*[257]) or cities (*civitates*, *coloniae*, *municipia*), were public corporations possessing governmental powers.[258] The modern law conception of a municipal corporation is the same.[259] In fact the Roman law of municipal corporations was the ancestor of much of the modern law on the same subject. Moreover, it is largely due to those cities which survived the Roman Empire's destruction and civilization's decay, that the principle of popular power and the rudiments of constitutional or free government were preserved in Europe. § 908

The city of the Roman world was the prototype of the

[255] Laborderie-Boulou, *Id.* He holds that the medieval jurist Durandus first laid down the rule that a notary was civilly responsible for ignorance of the law. As to Bartolus and Baldus, see supra vol. i, § 219.

[256] From A.D. 1201 onward: Laborderie-Boulou, *Id.* For the survival, in France, of the Roman conception of notary, see Savigny, *Geschichte d. röm. Rechts im Mittelalter*[2], vol. i, §§ 140.

[257] Under the Early Empire, *oppida* meant, in Italy, township districts, which might embrace suburban city communities (*vici*, *castella*) or rural communities (*pagi*): see Willems, *Droit public romain*[7], pp. 540–41.

[258] See supra § 538. The earliest Roman corporation was the public corporation: supra §§ 537, 547.

[259] See Kent, *Comm.* vol. ii, p. 275; Black, *Law dict.*[2], "municipal corporation".

modern city. "In its essential municipal wants and in the means of meeting them Ancient Rome bears a close analogy to London, Paris, or New York."[260] Roman cities had their departments of streets, fire, and police. Roman cities had numerous and often gigantic aqueducts, which furnished magnificent water-supplies. In some cities of modern Italy the aqueducts now in use were originally constructed by the Romans. Roman cities were drained by great sewers of an expensive character. A celebrated trunk line sewer of ancient Rome, the Cloaca Maxima, is still in use in modern Rome. Extensive public squares, parks, and recreation grounds were a feature of Rome and many provincial cities. The public baths of Roman cities, especially those of the capital, have never been surpassed in size or luxury by any modern municipal public baths. Before the Empire decayed, Roman cities were generally not fortified: in this respect they were like modern cities. Roman cities spread over large areas of land, thus permitting the building of one- or two-storied houses (as at Pompeii) and also much suburban growth.

§ 909 **Municipal government during the Republic.** After the Latin War, which closed in 338 B.C., there were in Italy three kinds of municipalities: colonies, municipia, and allied cities. This threefold division of Italian towns continued for nearly 250 years, until after the Social War.

1. Colonies (*coloniae civium Romanorum*). The colonial towns were composed of Roman citizens. The Roman colonists retained all the rights of Roman citizenship. In each colony the most prominent colonists formed the *curia*, a governing body similar to the senate of the city of Rome. In imitation of the consuls of Rome were developed the duumvirs (*duumviri*). Finally, the colonists had their popular assembly or *comitia*.

2. *Municipia.* The Italian inhabitants of municipia had only partial Roman citizenship. They were deprived of the right to vote in the Roman comitia[261] (*jus suffragii*), and they did not enjoy the right to hold Roman magistracies[262] (*jus*

[260] Dillon, *Municipal corporations*[4], vol. i, § 3a.

[261] See supra vol. i, § 49.

[262] See supra vol. i, §§ 40, 43, 50; vol. ii, §§ 875–8.

honorum). But the citizens of municipia had to pay the same taxes, and were liable for the same military service, as full Roman citizens. The government of municipia varied with the degrees of dependence upon Rome: some towns had local self-government[263]; others were governed directly by officials sent from Rome.[264] (§909)

3. Allied cities (*foederatae civitates*). These towns, although subordinate to Rome,[265] were really outside of the Roman State. The municipal government of allied cities was organized according to their own local laws.

After the close of the second Punic War (201 B.C.), when Rome triumphed over Hannibal and Carthage lost her power, the Italian cities began to claim full Roman citizenship in return for their services to the Republic. And during the 2d century B.C. numerous municipia obtained complete citizenship.[266] Early in the following century came the culmination of this movement: as a result of the great Social War the Italians throughout Italy obtained Roman citizenship.[267] By the lex Julia of 90 B.C. and the lex Plautia Papiria of 89 B.C. all Italian towns received full Roman citizenship. This legislation obliterated the old threefold distinction as to Italian municipalities. The term *municipium*, originally denoting a particular class of Italian towns, became the general name for all towns of Roman citizens in Italy.

Toward the close of the Republic was developed a system of municipal government,[268] which defined the relation of urban communities to the central Roman government and introduced a uniform basis for the regulation of municipal government. This work was probably inaugurated by Sulla, who was very influential in aiding the founding of citizen colonies outside of Italy. Subsequently Julius Caesar added to the extent of the Roman municipal system by including all the

[263] Livy, viii, 14 and 19.

[264] Livy ix, 43; Festus, *De verb. significatione*, "municipium" (Bruns, *Fontes juris* [6], part ii, p. 16.)

[265] The relations of Rome to each allied city were fixed by a treaty (*foedus*).

[266] Livy xxxviii, 36 and 37.

[267] Supra vol. i, § 47.

[268] See supra § 537.

towns of Cisalpine Gaul. But, excepting the citizen colonies of the provinces and the towns of Cisalpine Gaul, the Roman municipal system at the end of the Republic was limited to urban communities in Italy. The status of the provincial municipia was the same as that of the Italian.

The year before Caesar's death he caused the enactment of a law, which gave a definite and uniform governmental organization to the municipia and which served as a model law for subsequent Imperial statutes aiming at uniformity of municipal organization.[269]

§ 910 **Municipal government during the Empire: (1) the Early Empire and prior to Constantine the Great.** Augustus and his successors continued the work of extending the sphere of the Roman municipal system to include the provinces outside of Italy, especially in the eastern part of the Empire where there were numerous cities and towns which had been fostered by Greek civilization. At the close of the 1st century A.D., the Roman uniform municipal system, inaugurated by Julius Caesar,[270] was no longer limited principally to Italy: it had become widely extended throughout the Empire by the inclusion of existing provincial towns. And before the close of the Early Empire the cities, wherever located, became organized and administered uniformly in imitation of the capital city Rome.[271]

Meanwhile the Roman jurists had developed the conception of an artificial or juridical personality for cities, thus enabling municipalities to hold large amounts of property

[269] Willems, *Droit public romain*[7], p. 515, note 3. The *lex Julia municipalis* was passed 45 B.C. The text of this statute is given in Bruns, *Fontes juris*[6], part i, pp. 104–13. It is translated into English by Hardy, *Six Roman laws*, pp. 136–63. See also Willems, *Id.* p. 515, note 4, for *lex Coloniae Juliae Genetivae s. Ursonensis* (text given in Bruns, *Id.* p. 123).

[270] See supra § 909.

[271] Arnold, *Roman provincial administration*[2], ch. vii, section ii, pp. 235, 240. See also the *lex Salpensana* and *lex Malicitana* (the latter applicable to the Spanish city of Malaga), which were enacted A.D. 82–84 in the reign of Domitian; the text of these laws is given in Bruns, *Fontes juris*, part i, pp. 142-7 (see also Willems, *Droit public romain*[7], p. 515, note 5).

and live a corporate life[272]: during the first two centuries of the Empire this contributed enormously to increase the prosperity of the cities, especially the Italian. (§910)

1. **Boundaries of cities.** The limits of a municipium were fixed by some law.[273] Its territory embraced the town proper and its adjoining suburbs.[274]

2. **Municipal citizenship.** The free inhabitants of a city or town were of two classes: municipal citizens[275] (*municipes*, *coloni*, *cives*), and domiciled non-citizens[276] (*incolae*) whether full or partial[277] Roman citizens. Both the *municipes* and the *incolae* were liable for municipal taxes and other charges.[278] From the social point of view municipal citizens were divided into three classes[279]; the highest was the *ordo decurionum*, the local nobility, which corresponded to the senatorial order at Rome[280]; the next in rank was the *ordo Augustalium*, which, originally connected with the worship of Augustus, corresponded to the equestrian order at Rome; lastly the common people (*plebs*, *populus*, *municipes*, *coloni*).

3. **Municipal administration.** Prior to the Empire very little is known as to the internal administration of the municipia. The municipal government consisted of an assembly of the citizens, a senate, and some magistracies.

a. **Municipal assembly** (*comitia*). The assembly of the citizens elected annually the chief municipal magistrates (*duumviri*, *quattuorviri*), the aediles, quaestors, and the other

[272] See supra §§ 537–8, 547.

[273] By the *lex municipii* or *lex coloniae:* Willems, *Droit public romain*[7], p. 516. See supra second footnote immediately preceding and also § 909, last footnote.

[274] Paulus, *Sent.* 4, 6, § 2. See also supra § 908, first footnote.

[275] Willems, *Id.* p. 516. See *Dig.* 50, 1, 1, pr. and § 2, frag. 7, frag. 15, § 3, frag. 16, frag. 17, §§ 4 and 8, frag. 22, § 2; *Code*, 10, 40 (39), 7.

[276] Willems, *Droit public romain*[7], p. 516. See *Dig.* 50, 16, 239, § 2; *Dig.* 50, 1, 38.

[277] See also supra § 442.

[278] Willems, *Id.* p. 517; *Dig.* 50, 4, frag. 1, §§ 1–2, frag. 18, pr. See also *Dig.* 50, 1, 29; *Dig.* 50, 4, 3.

[279] Willems, *Id.* pp. 518–19.

[280] *Code*, 10, 32 (31), 36.

(§910) minor officials including *pontifices* and *augures*.[281] One of the *II viri* or *IV viri*, ordinarily the older or oldest in point of age, presided over the assembly.[282] The popular elections survived to a late date in Italy: for instance the inscriptions at Pompeii show that the elections in the 2d century of the Empire were keenly contested.[283]

b. City council or municipal senate (*curia, senatus, ordo decurionum, ordo splendissimus, decuriones conscriptive*). This political body was composed of a fixed number of members (*decuriones*[284]), generally 100, and had for its convoking and presiding officer one of the *II viri* or *IV viri*.[285] The list of the members of the senate (*album decurionum*) was made up every five years by the *II viri* or *IV viri*, who had to choose new decurions from those citizens eligible for the dignity. To become a decurion a person must be free-born,[286] not infamous,[287] not a member of certain professions, of full age,[288] and he must own a certain large amount of property.[289]

The municipal senate had charge of all the important business of the municipality. The functions of the *curia* were many: it took measures to protect the municipal territory; it appointed the religious fête-days; it was the source of authority for managing the municipal domains or lands, for carrying on public works, for filling vacancies in the office of municipal chief magistrate, for appointing the official municipal chief magistrate, for appointing the official municipal physicians, the professors of grammar, rhetoric, and philosophy,

[281] Willems, *Id.* p. 520.

[282] *Lex Malacitana*, ch. 52 (Bruns, *Fontes juris*[6], part i, p. 147).

[283] See Abbott, *Society and politics in ancient Rome* ("municipal politics in Pompeii"), pp. 3–21.

[284] These finally formed a corporation distinct from the municipium itself and called *collegium: Dig.* 4, 3, frag. 15, § 1.

[285] *Lex Malacitana*, ch. 68 (Bruns, *Id.*). The municipal senate is discussed at length by Willems, *Id.* pp. 521–7.

[286] See supra § 434. No freedman (*libertinus*) was eligible: *Code*, 9, 21.

[287] See supra § 453.

[288] *Dig.* 50, 4, 8. Majority was fixed at 25 years of age: supra § 447.

[289] 100,000 sestertia, says Pliny, *Epist.* i, 19. But if a decurio lost his fortune, he still remained a decurio. *Dig.* 50, 4, 6; *Dig.* 50, 2, 8.

of which there were a fixed number depending upon the size (§910) of the city and its importance; it could act as a court of appeal from certain municipal tribunals; it had charge of the sending of official deputations to the central government; it fixed the assessments for public works payable by landowners of the municipality.[290] To do any municipal business, ordinarily two-thirds of the members of the senate (*decuriones*) must be present, and a majority of those present must assent.[291]

c. Municipal magistrates. These were the *II viri* or *IV viri*, the aediles, quaestors, and municipal priests. The *II viri* or *IV viri* were the chief administrative officials.[292] They presided over the municipal assembly and the municipal senate. They had, subject to the control of the senate, full management of the municipal finances.[293] They had also considerable judicial authority as tribunals, exercising both civil and criminal jurisdiction.[294] If the Emperor or any member of the Imperial family was elected a *duumvir* or a *quattuorvir*, he might be represented in this municipal office by a delegate, the *praefectus Caesaris*.[295] The aediles, like those of Rome,[296] had charge of the police and regulated the public markets.[297] The quaestors had charge of the municipal treasury.[298] Among the municipal priests were a college of pontifices, a college of augurs, and the priests of the different divinities.[299]

4. Municipal revenues and expenditures. The municipal treasury obtained its revenues from taxation; from the income

[290] See Willems, *Id.* pp. 525–6.

[291] *Dig.* 3, 4, 3: *Dig.* 50, 9, 3; Willems, *Id.* p. 527.

[292] Willems, *Id.* pp. 528–36.

[293] But toward the end of the first century of the Empire, the central Imperial government began to encroach upon the financial administration of the municipia, and sometimes appointed a *curator reipublicae datus ab imperatore* to control municipal finances: Willems, *Id.* p. 532.

[294] Willems, *Id.* pp. 532–3.

[295] Willems, *Id.* p. 535; *Lex Salpensana*, ch. 24 (Bruns, *Fontes juris*[6], part 1, p. 144).

[296] See supra §§ 878, 889.

[297] Willems, *Id.* pp. 536–7.

[298] Willems, *Id.* pp. 537–8. See also supra §§ 883, 891.

[299] Willems, *Id.* pp. 538–9.

01 municipal lands; from interest on municipal investments; from rents for the use of aqueduct-water, sewers, and public baths; from fines received by the municipal courts; from the coinage of copper municipal money.[300] The chief municipal expenditures were for religious purposes, public games, and public works.[301]

§ 911 **Municipal government during the Empire: (2) the Later Empire, including Justinian's reign.** During the Early Empire the property-owning classes gradually acquired control of the municipal organization. The municipal senate (*curia*), the aristocratic part of the city government, finally acquired supreme authority in the municipia. Membership in the *curia* became hereditary[302]; all municipal offices were filled by decurions. The legislation of Diocletian and Constantine, with its marked centralization of power,[303] completed the destruction of the brilliant municipal organization of the Early Empire.

Most of the later innovations in Roman municipal government were made by Constantine the Great.[304] Not only was each province divided into township districts,[305] but at the bottom of Constantine's administrative system were placed the cities, which had to shoulder the entire weight of the expensive system of administration perfected by him and continued by his successors. The cities lost much of their income-bearing property, which was diverted to endow Christian churches and for other uses. Moreover, throughout the Empire, population was declining and prosperity was decreasing. The cities, originally vigorous autonomous governmental agencies, sank into mere administrative units to advance the welfare of the entire Empire — instrumentalities principally for the collection of taxes.

[300] Willems, *Droit public romain*[7], pp. 539–40.

[301] See Willems, *Id.* p. 539.

[302] *Code*, 10, 32 (31), 44.

[303] See supra vol. i, § 120; vol. ii, § 890.

[304] Reigned A. D. 313–37.

[305] In Italy these retained the old name of *oppida* (supra §§ 910, 908, footnote 1); in other praefectures these were generally termed *civitates*. These districts included, as formerly, both urban and suburban communities.

The entire municipal administration was placed in the hands (§ 911) of a few persons: in an age when Roman society was being converted into a system of castes rigidly defined and subjected to the authority of the all-pervading Imperial bureaucracy, it was easy to make hereditary[306] the membership in the municipal senate (*curia*) — now held responsible for the corporate duties of the city, especially the collection of taxes. No curial could leave his city without the consent of the provincial governor[307]; not even by flight could a decurion escape his duty to collect taxes.[308] Bankruptcy of a curial might frequently require his fellow decurions to make up the sum due from the city. The wretched curials became virtually slaves of the State for the collection of taxes.[309] In many respects the municipal government of the Later Empire did not differ much from that of the Early Empire. The following are the chief similarities and differences.

The free inhabitants of a city were divided, as of old, into citizens (*cives*) and domiciled residents not citizens (*incolae*).[310] But after the recognition of Christianity as a lawful religion,[311] the *ordo Augustalium* disappeared.[312] The aristocratic class of citizens was, as formerly, the *ordo decurionum*.[313]

The municipal assembly (*comitia*[314]) no longer existed: its powers were transferred to the city council or municipal senate (*curia*).[315] In addition to the familiar *II viri* or *IV viri*, aediles, and quaestors[316] a new municipal official and magis-

[306] *Code*, 10, 32 (31), 44.

[307] *Dig.* 50, 2, 1.

[308] See *Code*, 10, 38 (37).

[309] See for example *Code*, 10, 34, 1; *Code*, 10, 32, 38; *Cod. Theod.* 12, 1, 66. To be sure the decurions had a few privileges, such as the right to legitimate a child by enrolling him a member of the *curia:* see supra § 495 (but this was really intended to increase the number of curials for the Imperial benefit). The decurions could not be soldiers or priests: *Code*, 1, 3, 12.

[310] Willems, *Droit public romain*[7], p. 607. See supra § 910.

[311] See supra vol. i, § 145.

[312] Willems, *Id.* p. 609. See supra § 910.

[313] *Id.*

[314] See supra § 910.

[315] Discussed supra § 910.

[316] All are treated supra § 910.

trate, the *defensor civitatis*, was instituted in A.D. 364–5 by the Emperor Valentinian I.[317] The municipal finances were always administered — under the control of the provincial governor — by the *curator reipublicae* (or, as he was sometimes called, *logista* or *pater civitatis*), an official occasionally during the Early Empire put in charge by the central government.[318] The municipal revenues were derived, as formerly, from the same sources; and the municipal expenditures were made along the old lines, the chief difference being the appropriation of money for the maintenance of the Christian, and not the pagan, religion.[319]

§ 912 **Rights and duties of municipal corporations.** A city or town could acquire, possess, or alienate property.[320] Municipalities finally obtained the right to acquire property by testamentary disposition or succession — that is, were empowered to receive bequests by way of legacy or trust, or to be appointed heirs.[321] Although a city could contract with other persons,[322] there was a peculiar Roman rule as to loans made to a municipality: the money from such loans must be used for the benefit of the municipality; otherwise only the individuals doing business for the city, and not the city itself, were liable on the loan.[323]

[317] *Cod. Theod.* 1, 29, 1 and 2; *Code Justinian*, 1, 55; Willems, *Droit public romain*[7], p. 613. The *defensor civitatis* is treated supra § 900.

[318] Willems, *Id.* p. 612. See supra § 910.

[319] Willems, *Id.* p. 613. See supra § 910.

[320] *Dig.* 3, 4, 1, § 1. See *Dig.* 50, 4, frag. 1, § 2, frag. 18.

[321] The right to receive legacies, long denied, was first granted to towns and cities by the Emperor Nerva: Ulpian, *Reg.* 24, § 28. This privilege was enlarged by Hadrian. Marcus Aurelius extended it to all corporations, private as well as municipal: *Dig.* 34, 5, 20; Gaius, 2, 195. Bequests by way of trusts (see supra § 712) were first recognized as valid, probably in the time of Hadrian: Ulpian, *Reg.* 22, § 5; *Dig.* 36, 1, 27 and 28. Although the Early Imperial law denied the right of cities or towns to be appointed heirs, except in the case of their freedmen (Ulpian, *Reg.* 22, § 5), the Emperor Leo I in A. D. 469 conceded this right to municipalities (*Code*, 6, 24, 12); and such was the Justinian law. As to loss of a legacy by dissolution of a municipal corporation, see *Dig.* 7, 4, 21.

[322] *Dig.* 3, 4, frag. 1, § 1, frag. 10. The city must act through its proper officer, known as *actor* or *syndicus*.

[323] *Dig.* 12, 1, 27.

A municipality, acting through its proper officer, could (§912) sue and be sued in a court of justice.[324] A municipality might be dissolved by act of the State.[325]

[324] *Dig.* 3, 4, frag. 2, frag. 1, §§ 1–2, frag. 10. The proper officer was the *actor* or *syndicus:* to authorize him to take legal proceedings, a majority vote of two-thirds of the members (decurions) of the municipal senate was ordinarily necessary: *Dig.* 3, 4, 3. When a municipality was not defended in a lawsuit and judgment went by default against a city or town, the suing creditor could either seize municipal property or attach debts due the city or town: *Dig.* 3, 4, 8. Generally the provincial governor could allow a stranger to defend an action brought against a municipality, because it was for the public interest to permit him: *Dig.* 3. 4, 1, § 3.

[325] See *Dig.* 7, 4, 21, which holds that the dissolution of a municipal corporation may extinguish its property rights. All actions in behalf of or against a municipal corporation must, to be effective, be instituted prior to dissolution: *Dig.* 3, 4, 7, § 2.

CHAPTER II

CRIMINAL LAW

1. PUNISHMENTS (POENAE)

§ 913 **Capital punishments: (1) death) (2) certain sentences for life, namely banishment, deportation, condemnation to the mines or the public works.** In the Imperial Roman law, punishments for crimes were either capital or non-capital. A capital punishment was one affecting the *caput* or status of the criminal[1]; in other words, a capital punishment was either death or forfeiture of citizenship.[2]

The modes of executing the death penalty varied with the period of Roman law considered. During the Republic an unchaste vestal virgin was buried alive, and false witnesses were hurled from the Tarpeian Rock.[3] In the 2d century B.C. there were passed three *leges Porciae*, one of which made it a serious offense to scourge or kill a Roman citizen[4]: the effect of this statute was practically to abolish the death penalty, which, during the remainder of the Republic, was generally replaced by banishment involving loss of citizenship[5] (*interdictio aqua et igni*).

During the Empire the usual modes of executing the death penalty were decapitation, burning, and crucifixion[6] (this last being inflicted on slaves), although sometimes the death sentence was given in the repulsive form of condemning the

[1] See supra § 432.

[2] *Dig.* 48, 19, 2, pr. See also supra § 432.

[3] *XII Tables*, 8, 23.

[4] This *lex pro tergo civium lata* was perhaps enacted 197 B. C. On this legislation, see Livy x, 9; Willems, *Droit public romain*[7], p. 50; Smith, *Dict. of Greek and Rom. antiq.* vol. ii, p. 50.

[5] Willems, *Id.* But the death penalty was not absolutely abolished: *Id.*

[6] Paul. *Sent.* 5, 17, 3,; *Dig.* 48, 19, 28, pr.

victim to be thrown to wild beasts in the arena.[7] Crucifixion and condemnation to the wild beasts were abolished by Constantine.[8]

The capital punishments which, although sparing the criminal's life, involved the forfeiture of his citizenship and the confiscation of his property, were banishment (*interdictio aqua et igni*), deportation to an island (*deportatio in insulam*), and condemnation to the mines (*in metallum, in opus metalli*) or the public works (*in opus perpetuum*).[9] All these penalties involved loss of freedom, and afflicted the condemned with penal servitude[10]: in other words, these penalties produced *civil* death,[11] — therefore they were capital. Banishment — also called exile (*exilium*[12]) — was a Republican penalty, which was largely superseded under the Empire by deportation, a similar punishment. Servitude arising from being sentenced to the mines was abolished by Justinian.[13] The death penalty still exists in the criminal law of most countries. The French "déportation", as a substitute for the death penalty in certain cases,[14] is reminiscent of the Roman "deportatio".

Non-capital punishments: (1) relegation, (2) corporal punishment, (3) imprisonment, (4) miscellaneous penalties. Relegation (*relegatio*) was a mild form of deportation; it might be for a time or for life, and generally did not involve confiscation of property.[15] Relegation might be to an island or elsewhere.[16] Corporal punishment, such as scourging or flogging, was a punishment for certain crimes.[17] § 914

[7] See *Collatio Mos. et Roman.* 11, 7.

[8] *Code*, 11, 44, (43), 1; Mackenzie, *Roman law*[7], p. 428.

[9] *Dig.* 48, 19, frag. 8, § 6, frag. 12, frag. 15, frag. 28, §§ 1 and 6; *Code*, 9, 47, 1.

[10] See supra § 438.

[11] See supra § 452.

[12] *Dig.* 48, 1, 2.

[13] *Nov.* 22, ch. 8.

[14] See *Code pénal*, art. 7; laws of June 8, 1850; March 23, 1872; and March 25, 1873. Originally, like the Roman, the French déportation involved civil death: see the former art. 18 of the *Code pénal*.

[15] Modestinus, frag. 2 (*Collectio librorum juris ante-Justiniani*, Berlin, 1898, vol. ii, p. 161).

[16] See *Dig.* 48, 19, 5.

[17] *Dig.* 48, 19, 7.

Although Roman law made imprisonment a punishment for certain crimes, life imprisonment — except in the form of penal servitude — was not a punishment.[18] Among the miscellaneous Roman punishments for crimes were fines,[19] degradation of rank,[20] and disbarment of an advocate.[21] Among the punishments of modern American criminal law are imprisonment and fines.

2. CRIMES (CRIMINA)

(1) Offenses Against the Government

§ 915 **Treason or lèse-majesté (perduellio, crimen laesae majestatis).** The original Roman conception of treason was any offense committed against the safety of the State.[22] Under the Empire the law of treason was extended not only to attempts against the Emperor's life[23] and insults offered to his statue,[24] but also to offenses committed for the purpose of overturning the government or of usurping its prerogatives, and even to offenses against the public peace.[25]

The principal offenses added by the Imperial law to the list of treasonable crimes were the following: attempt against the life of a Senator or of a member of the council of State (*consis-*

[18] *Dig.* 48, 19, 8, § 9; see supra § 913.

[19] *Dig.* 48, 1, 2.

[20] *Dig.* 1, 9, 3; *Dig.* 48, 22, 7, § 20.

[21] *Dig.* 48, 19, 9, pr. See supra § 906.

[22] "Majestatis autem crimen illud est, quod adversus populum Romanum vel adversus securitatem ejus committitur": *Dig.* 48, 4, 1. The offenses constituting treason were finally defined by the *lex Julia majestatis*, enacted by Julius Caesar: Moyle, *Inst. of* Justinian, vol. i, 5th ed., p. 621. The ancient term for treason was *perduellio*; under the Empire treason was generally referred to as *crimen laesae majestatis*; but in the 3d century A. D. the above two terms were still in use: see *Dig.* 48, 4, 11 (Ulpian, — supra vol. i, § 108).

[23] "Crimine majestatis quod ad salutem principis pertinet": *Code*, 9, 41, 1, pr. To even question the Emperor's choice of a successor was treason: *Code*, 9, 29, 2 (3).

[24] *Dig.* 48, 4, 6. But mere verbal insults, not offered to his statue, were not treason: *Dig.* 48, 4, 7, § 3; Paul. *Sent.* 5, 29, 1; *Code*, 9, 7, 1.

[25] Dig. 48, 4, frag. 1, § 1, frag, 2–3, frag. 4, pr.; Paul. *Sent.* 5, 22.

torium),[26] conspiracy to murder a magistrate or hostages,[27] a seditious conspiracy or gathering,[28] riot,[29] desertion from the army,[30] making false entries in public records,[31] and releasing a person who had pleaded guilty to a criminal charge.[32]

The accused, of whatever rank, might be subjected to torture.[33] For the graver acts of treason the punishment was death.[34] A person might be tried and attainted for treason, even after his death, in order that the Emperor might confiscate his property.[35]

Treason is also a crime in modern law, for instance that of Great Britain and the United States.[36] Blackstone considers high treason as "equivalent to the *crimen laesae majestatis* of the Romans."[37] Modern law punishes, but not as treason, the modern counterparts of the crimes finally added by Roman law to the list of treasonable offenses.

Piracy. Roman law placed pirates in the category of brig- § 916
ands and robbers.[38] Modern American law also punishes piracy as a species of robbery.[39]

[26] *Code*, 9, 8, 5. See supra § 894.
[27] *Dig.* 48, 4, 1, § 1.
[28] Paul. *Sent.* 5, 22.
[29] *Dig.* 48, 4, 1, § 1.
[30] *Dig.* 48, 4, 2.
[31] *Id.*
[32] *Dig.* 48, 4, 4, pr.
[33] *Code*, 9, 8, 4.
[34] *Dig.* 48, 4, 11; Paul. *Sent.* 5, 29, 1. Such was also the original Republican penalty: but the old *lex Julia majestatis* substituted therefor banishment (*interdictio aqua et igni*). The death penalty was restored as early as Tiberius' reign: Tacitus, *Ann.*, vi, 18. For the less serious offenses of treason the punishment was deportation: see for instance *Dig.* 48, 19, 40.
[35] His memory was thus declared infamous: see supra § 453; *Code*, 9, 8, 6, pr. Such despotic procedure was possible, strictly speaking, if the charge was *perduellio* and not *laesa majestas:* see *Dig.* 48, 4, 11. Trials for treason after death were possible in French and Scotch law as late as the 17th century; Mackenzie, *Roman law*[7], pp. 410–11.
[36] Blackstone, *Comm.* vol. iv, p. 75; Clark, *Criminal law*, p. 32.
[37] Blackstone, *Id.*
[38] *Dig.* 49, 15, 24. See Phillipson, *Internat. law of Greece and Rome*, vol. ii, pp. 373 et seq. As to robbery see infra § 929.
[39] Kent, *Comm.* vol. i, p. 183; Clark, *Criminal law*, p. 355.

§ 917 **Counterfeiting, adulterating the coinage.** These offenses, and the offense of refusing to take lawful money not adulterated, were crimes punishable either by death or deportation.[40] Counterfeiting and offenses involving the purity or integrity of the coinage are crimes also in modern law.

(2) Offenses Against Public Justice

§ 918 **Misconduct by State officials.** To unlawfully cause a citizen to be beaten, tortured, or killed, while an appeal was pending, was a crime punished either by death or deportation.[41] To collect taxes without authority was a crime.[42]

§ 919 **Interference with the administration of justice.** Concealment of a crime, or by collusion to procure the acquittal of an accused person, was a crime called *praevaricatio*,[43] the punishment for which was originally the penalty that the accused would have received.[44] A lawyer committing this offense against his client was similarly punished.[45]

To maliciously bring an accusation or criminal charge against a person was a crime known as *calumnia*,[46] the original punishment for which was branding with the letter K.[47] To forcibly obstruct trials or to compel a judge to act was a crime.[48] If an accuser improperly abandoned a criminal

[40] Paul. *Sent.* 5, 25, 1. Constantine made burning to death the mode of punishment: Code, 9, 24, 1. Counterfeiting was a variety of the *crimen falsi* of the *lex Cornelia de falsis:* see Tacitus, *Ann.* xiv, 40–41; *Dig.* 48, 10; *Code*, 9, 22. On the influence of the *crimen falsi* in English law, see Blackstone, *Comm.* vol. ii, pp. 88, 247.

[41] Paul. *Sent.* 5, 26, 1.

[42] *Dig.* 48, 6, 12.

[43] *Dig.* 48, 16, 1, § 6.

[44] *Dig.* 47, 15, 6. Subsequently the judge was given power to fix the penalty at his discretion: *Dig.* 47, 15, 2.

[45] *Dig.* 47, 15, frag. 1, § 1, frag. 6.

[46] *Dig.* 48, 16, 1, § 5.

[47] By the *lex Remmia:* see *Dig.* 48, 16, 1, § 2; Smith, *Dict. of Gr. and Rom. antiq.*[3], "calumnia". Constantine abolished this (*Code*, 9, 47, 17), the later punishment being banishment or relegation without loss of citizenship or degradation of rank: *Dig.* 47, 10, 43.

[48] *Dig.* 48, 6, 10. It was punished by the *lex Julia de vi publica.*

prosecution, this offense — known as *tergiversatio*[49] — was severely punished as a crime.[50]

Perjury. Under certain circumstances perjury or false swearing was a crime.[51] For instance to give false evidence was a crime[52]; to swear falsely *per genium principis* was severely punished[53]; and to cause by false testimony the conviction of a person for an offense the penalty for which was death, was a crime punished either by death or deportation.[54] Perjury is a crime also in modern American law.[55] § 920

Bribery. Many offenses in the nature of bribery were made crimes by Roman law. Among these were the following: the receipt of money to charge or refuse to charge a person with a crime[56]; to corrupt, or procure the corruption, of a judge[57]; the taking of money by a State official to act in violation of his duty.[58] Bribery is a crime also in modern American law.[59] § 921

(3) Offenses Against Public Morals

Bigamy, adultery, seduction (stuprum), **abortion, crimes against nature.** Polygamy or bigamy was severely punished in Roman law.[60] Bigamy is a crime also in modern American law.[61] § 922

[49] *Dig.* 48, 16, 1, §§ 1 and 7. This crime was introduced by the SC. Turpillianum in the reign of Nero.

[50] See *Code*, 9, 45, 2.

[51] Perjury was a variety of the *crimen falsi:* see *Inst.* 4, 18, 7; *Dig.* 48, 10; *Code*, 9, 22.

[52] *Dig.* 22, 5, 16. See Williams, *Inst. of Justinian ill. by Eng. law* [2], p. 313.

[53] *Dig.* 12, 2, 13, § 6.

[54] Paul. *Sent.* 5, 23, 1; *Dig.* 48, 8, 16. This crime was prohibited by the *lex Cornelia de sicariis.*

[55] Clark, *Criminal law*, p. 330.

[56] *Dig.* 47, 13, 2. If a crime was punishable with death and the receiver of the bribe was a magistrate, he himself was punished with death: *Dig.* 48, 8, 1, § 1; otherwise the penalty was deportation (*Dig.* 48, 8, 3, § 5).

[57] *Dig.* 48, 10, 21. This was forbidden by the *lex Cornelia de falsis.*

[58] *Dig.* 48, 11, frag. 6, § 2, frag. 7. This crime was forbidden by the *lex Julia repetundarum*, and was punished either with exile or deportation.

[59] Clark, *Criminal law*, p. 335.

[60] See *Inst.* 1, 10, §§ 6 and 7; *Dig.* 3, 2, 1; *Code*, 5, 5, 2. The punishment included infamy (defined supra § 453).

[61] Clark, *Criminal law*, p. 309.

(§922) Adultery (*adulterium*) or violation of conjugal fidelity was punished during the Early Empire by fine and relegation of both the adulterer and the adulteress.[62] Constantine punished the adulterer with death.[63] Justinian enacted that the adulteress should be first whipped and then sent to a convent, where, unless the husband took her out in two years, she had to remain for life.[64] To constitute adultery, the offending woman must be *married;* if she were unmarried, there was no adultery, not even if the offending man himself was married.[65]

In most of the United States adultery is also a crime.[66] And some states — following the Roman rule — hold that there is no adultery unless the woman is married, in which case both parties are guilty: in other words, if the man is married and the woman is single, the offense is not adultery.[67]

Stuprum was the seduction of a free and respectable unmarried woman.[68] In the time of Justinian the penalty for seduction varied with the rank of the offender: a common person was punished corporally and then relegated, but a person of rank forfeited half of his property.[69] Seduction is a crime also in modern American law.[70]

[62] Paul. *Sent.* 2, 26, 14. The Imperial law of adultery rested on the *lex Julia de adulteriis* of Augustus: *Dig.* 48, 5, 1; *Collatio Mos. et Rom.* 4, 2. If a husband did not divorce his adulterous wife, and let the adulterer off, he was guilty of *lenocinium:* see *Dig.* 4, 4, 37, § 1; *Dig.* 48, 2, 3, § 3. On the subject of adultery, see Mommsen, *Röm. Strafrecht,* vol. ii, pp. 682–704; Hunter, *Roman law*[4], pp. 1070–71.

[63] *Code,* 9, 9, 29, § 4: "sacrilegos autem nuptiarum gladio puniri."

[64] *Nov.* 134, ch. 10.

[65] See *Dig.* 48, 5, 6, § 1; *Dig.* 50, 16, 101, § 1. The purpose of the law against adultery was to prevent the danger of putting spurious children upon the husband. Hence the infidelity of the husband was no offense of which the wife could complain: *Code,* 9, 9, 1.

[66] Clark, *Criminal law,* pp. 312–6.

[67] Clark, *Id.* p. 313. The states reiterating the Roman rule are Massachusetts, New Hampshire, New Jersey, Indiana, and Minnesota.

[68] *Inst.* 4, 18, 4; *Dig.* 48, 5, 34, pr. It was punished by the *lex Julia de adulteriis.*

[69] *Inst.* 4, 18, 4. But if the girl was under the age of puberty (12 years), a common person was condemned to penal servitude in the mines, and a person of rank suffered relegation: *Dig.* 48, 19, 38, § 3.

[70] Clark, *Criminal law,* p. 194.

If a woman, married or single, procured an abortion, this offense was a crime punished variously — sometimes with relegation and forfeiture of half of the offender's property, sometimes with penal servitude in the mines, sometimes with banishment, and sometimes with death.[71] Abortion is a crime also in modern American law.[72]

Incest and sodomy, crimes against nature, were most severely punished in Roman law: the penalty for incest was deportation[73]; the Later Imperial penalty for sodomy was death by burning.[74] Incest and sodomy are crimes also in modern American law.[75]

(4) Offenses Against the Person

Murder, homicide, suicide. That case of willful homicide known as parricide — the murder of a parent or a spouse or a near relative — was always punished with death, under both the Republic and the Empire.[76] The murderer of a parent or grandparent suffered a novel form of death: the criminal was sewed up in a sack with a dog, cock, viper, and ape, and then thrown into the sea or a river[77]; but the murderer of other relatives suffered simply death.[78] § 923

All other cases of willful homidice were, under the Empire, generally punished with death.[79] Homicide caused by

[71] Paul. *Sent.* 5, 23, 14; *Dig.* 47, 11, 4; *Dig.* 48, 8, 8.

[72] Clark, *Crim. law*, pp. 180–92.

[73] Paul. *Sent.*, 2, 26, 15.

[74] *Cod. Theod.* 9, 7, 6; *Code Justinian*, 9, 9, 31. The Early Imperial penalty was also death: Paul. *Sent.* 2, 26, 12.

[75] Clark, *Criminal law*, pp. 192, 319.

[76] The *lex Pompeia de parricidiis* embraces in the category of parricide the following offenses: where a person causes the death of his or her father, mother, grandfather, grandmother, or other ascendant, uncle, aunt, brother, sister, husband, wife, relative by marriage, patron or ex-master, a child killed by the mother, and grandchild killed by the grandfather (*Dig.* 48, 9, 1). To this list Constantine added the killing of a son by the father: *Code*, 9, 17, 1.

[77] *Inst.* 4, 18, § 6; *Dig.* 49, 9, 9, § 1. If there was no sea or river in the vicinity, the criminal was thrown to wild beasts: *Dig.* 48, 9, 9, pr.

[78] *Dig.* 49, 9, 9, § 1.

[79] This was the penalty for the common people: *Dig.* 48, 8, frag. 3, § 5, frag. 16. But the penalty for a person of high rank was deportation and forfeiture of his property: *Id.*

poisoning was murder.[80] After Christianity had become the established religion of the Empire, the offering of a child as a sacrifice was made murder.[81]

The killing of a human being by negligence was punished either with relegation or penal servitude in the mines.[82] But a father could kill with impunity an adulterer caught with his daughter at his own or his daughter's residence, provided that he did not fail to kill also his daughter[83]; and likewise it was lawful for a husband to kill an adulterer of base rank[84] who was similarly caught with his wife, although he must not kill the wife but must divorce her speedily.[85]

Homicide was always justified if done in self-defense.[86] Although murder is a crime also in modern law, for instance the American,[87] nevertheless homicide in self-defense is excusable.[88]

In Roman law, self-destruction was treated as a crime involving forfeiture of the suicide's property, whenever a person took his life to escape punishment for a crime.[89] Suicide, although self-murder according to the English Common Law,[90] does not in American law result in punishment for the person taking his life[91]: but an attempt to commit suicide is sometimes made by statute a criminal offense.[92]

§ 924 **Assaults, forcible ejectment, and reclaiming.** To seriously beat or strike another was a crime punishable variously —

[80] By the *lex Cornelia de sicariis et veneficis: Dig.* 48, 8, 3, pr.

[81] *Code*, 9, 16, 7 (A.D. 374).

[82] *Dig.* 48, 8, 4, pr.; Paul. *Sent.* 5, 23, 12. This punishment was one inflicted *extra ordinem* (see infra § 936), for the *lex Cornelia de sicariis* did not provide any penalty for homicide due to negligence: *Dig.* 48, 8, 7.

[83] Paul. *Sent.* 2, 26, 1; *Collatio Mos. et Rom.* 4, 9, 1.

[84] A slave, freedman, or infamous (supra § 453) person.

[85] Paul. *Sent.* 2, 26, 5–6; *Coll. Mos. et Rom.* 4, 10, 1.

[86] *Inst.* 4, 3, 2; *Dig.* 9, 2, 4.

[87] Clark, *Criminal law*, p. 158.

[88] Clark, *Id.* p. 149.

[89] But the penalty for the crime must be forfeiture of property: *Dig.* 48, 21, 3. On the subject of suicide, see Paul. 5, 12, 1c.; *Dig.* 48, 21; *Code*, 9, 2, 12; *Code*, 9, 50; *Bas.* 60, 53. See *Dig.* 49, 16, 6, § 7.

[90] Blackstone, *Comm.* vol. iv, p. 189.

[91] Clark, *Criminal law*, p. 164.

[92] *Id.*

from whipping to temporary banishment.[93] An assault might be committed by a group of persons assembled to beat or strike another.[94] To castrate another, with or without his consent, was a criminal offense.[95] Modern American law treats assaults as crimes.[96]

To forcibly eject a person from his land was a crime punishable with banishment, if the ejectment was with weapons, or with a fine if the ejectors had no weapons.[97] To forcibly reclaim property was also a criminal offense.[98] Reminiscent of these Roman crimes are the modern American forcible entry and forcible detainer.[99]

§ 925 **Rape, abduction.** The penalty in Roman law for rape (*raptus mulierum*) was death.[100] Abduction for immoral purposes was punished either with death or deportation.[101] Both rape and abduction are crimes also in modern American law.[102]

§ 926 **False imprisonment, kidnaping.** To willfully imprison a free man, or to restrain his liberty, or to be a party to such false imprisonment, was punished variously — sometimes with a fine, sometimes with banishment, and sometimes with penal servitude in the mines.[103] The kidnaping (*plagium*) of a free-born person was punished with death.[104] False imprisonment and kidnaping are crimes also in modern American law.[105]

§ 927 **Libel, blackmail.** To attack the honor or reputation of another was always a grave criminal offense, being punished

[93] *Dig.* 47, 10, 35 and 45.

[94] Punishable by the *lex Julia de vi publica* and *privata:* see *Dig.* 48, 6, 10; *Dig.* 48, 7, 2.

[95] Punishable by the *lex Cornelia de sicariis:* see *Dig.* 48, 8, 3, § 4.

[96] Clark, *Crim. law*, p. 182 (mayhem), p. 198 (assaults).

[97] *Dig.* 48, 6, 3, § 6; *Dig.* 48, 7, 5; *Code*, 9, 12, 6. Forcible ejectment was a provision of the *lex Julia de vi publica* and *lex Julia de vi privata.*

[98] *Dig.* 48, 8, 3, § 4. The punishment was prescribed by the *lex Cornelia de sicariis.*

[99] Clark, *Criminal law*, p. 345.

[100] *Dig.* 48, 6, 3, § 4; *Code*, 9, 13, 1.

[101] *Dig.* 48, 10, 1, § 2; Paul. *Sent.* 5, 4, 21.

[102] Clark, *Criminal law*, pp. 184, 222.

[103] *Dig.* 48, 6, 5; *Dig.* 48, 15, frag. 6, § 2 and frag. 7

[104] *Code*, 9, 20, 7.

[105] Clark, *Criminal law*, pp. 218, 220.

as early as the XII Tables, which provided that the writer of the defamatory statement should be beaten to death with clubs.[106] In the Imperial law the penalty for libel or its dissemination was either relegation or deportation.[107] Libel is among the crimes punished by modern American law.[108]

To attempt to extort money by threats of a criminal prosecution was punished as a crime.[109] This offense is known as blackmail in modern American law.[110]

(5) Offenses Against Property

§ 928 **Arson.** To maliciously burn the house of another was a crime, the punishment for which in serious cases was death.[111] This offense is also a crime in modern American law, and is known usually as arson.[112]

§ 929 **Theft, robbery.** The offense of theft (*furtum*) was always a tort redressable by a civil action,[113] and if serious it was also a crime.[114] A person aiding and abetting the commission of a theft was chargeable as a thief, because he was an accomplice.[115]

The crime of theft was severely punished. Cattle-stealers (*abigei*)[116] were punished either with death or relegation.[117] The receivers of such stolen property were treated like the thieves.[118] Nocturnal thieves and persons stealing from public baths were condemned to the public works.[119] Burg-

[106] *XII Tables*, viii, 1.

[107] Paul. *Sent.* 5, 4, 15; *Code*, 9, 36, 2. See *Dig.* 47, 10, 38.

[108] Clark, *Crim. law*, p. 346. But in our law there is also a tort known as libel: see supra § 823; Cooley, *Torts* [2], p. 225.

[109] *Dig.* 47, 13, 2.

[110] Black, *Law dict.* [2], "blackmail", p. 137.

[111] "Si quis dolo insulam meam exusserit, capitis poena plectetur quasi incendiarius": *Dig.* 48, 8, 10. "Incendiarii capite puniuntur . . . aliquo lenius": *Dig.* 48, 19, 28, § 12.

[112] Clark, *Criminal law*, p. 226.

[113] See supra § 824.

[114] *Dig.* 47, 2, 93 (92).

[115] Gaius, 3, 202; *Inst.* 4, 1, 11.

[116] This crime is treated in *Dig.* 47, 14, frag. 1, § 1, frag. 3.

[117] *Dig.* 47, 14, 1, pr. and § 3.

[118] *Dig.* 47, 16, 1. See *Dig.* 47, 14, 3, § 3.

[119] *Dig.* 47, 17, 1.

lars (*effractores, directarii*) were punished variously according to the gravity of the offense: the penalties ranged from flogging to relegation or condemnation to the public works or penal servitude in the mines.[120] The punishment for stealing from a wrecked ship was severe.[121] To steal from a burning house was punished with banishment.[122]

The punishment for highway robbery varied from relegation to the mines and death.[123] The assembling of armed persons for the purpose of robbing a house was also punished with death.[124]

Corresponding to the criminal phases of the Roman theft (*furtum*) and robbery (*rapina*), are the modern American crimes of larceny or theft, burglary, and robbery.[125]

Sacrilege, peculatus, crimen expilatae hereditatis. Sacrilege was the theft of sacred or public property.[126] Its punishment might be the mines or deportation or death.[127] *Peculatus* was a form of embezzlement, and consisted in the unlawful appropriation of sacred or public property to one's own use.[128] The punishment was finally either death or deportation.[129] If, prior to an heir's acceptance of his inheritance, property of the decedent was stolen, the thief was guilty of the *crimen expilatae hereditatis*.[130] § 930

Stellionate, forgery, offenses as to wills. Under the Empire a new crime of a general nature was invented, called *stellionatus*. The jurist Ulpian describes it as answering to fraud in § 931

[120] *Dig.* 47, 18, 2; *Dig.* 47, 11, 7.

[121] By the *lex Julia de vi privata:* see *Dig.* 48, 7, 1, § 2.

[122] By the *lex Julia de vi publica:* see *Dig.* 48, 6, 5.

[123] *Dig.* 48, 19, 28, § 10. Robbery was also a tort, redressable by a civil action: see supra § 826.

[124] *Dig.* 48, 6, 11, pr.

[125] Clark, *Criminal law*, pp. 232, 241, 284.

[126] *Dig.* 48, 13, 4, § 2.

[127] *Dig.* 48, 13, 7, pr.

[128] *Dig.* 48, 13, frag. 1, frag. 5, § 7. The crime was introduced by the *lex Julia peculatus*.

[129] *Inst.* 4, 18, 9. See Paul. *Sent.*, 5, 27, 1, for the original penalty.

[130] *Dig.* 47, 19, 2, § 1. The punishment was *extra ordinem*, — at the discretion of the court: *Dig.* 47, 19, 1; see infra § 936. The heir had no title upon which to base an action of theft, until he had accepted or obtained possession of the inheritance: see supra § 665, on *aditio hereditatis*.

(§ 931) civil actions[131]: in other words, *stellionatus* was committed when any person contracts as to property after he has lost his power to contract.[132]

The following were instances of this crime: payment of a debt by means of property mortgaged to another[133]; selling property twice over[134]; mortgaging property a second time by concealing an existing mortgage[135]; and other criminal offenses not defined by law.[136] The punishment varied from penal servitude in the mines to degradation of rank or also relegation.[137]

From the Roman "stellionatus" came the "stellionate" of Scotch law and the "stellionat" of French law. Says the Scotch Erskine: "The crime of stellionate . . . was formerly, but is no longer, used to include every fraud which was not distinguished by a special name; but was chiefly applied to conveyances of the same right granted by the proprietor to different disponees."[138] Article 2059 (now abrogated) of the French Civil Code defined *stellionat* as (1) sale or mortgage of property which the vendor or mortgagor does not own; (2) representing mortgaged property to be free of mortgage or that the amount of the mortgage is less than it is.

The forgery of writings or instruments[139] imposing a legal liability was punished in Roman law with relegation.[140] The

[131] "Quod enim in privatis judiciis est de dolo actio, hoc in criminibus stellionatus persecutio": *Dig.* 47, 20, 3, § 1.

[132] *Code*, 9, 34, 2.

[133] *Dig.* 47, 20, 3, § 1.

[134] *Dig.* 48, 10, 21.

[135] *Code*, 9, 34, 1.

[136] "Ubicumque titulus criminis deficit, illic stellionatus": *Dig.* 47, 20, 3, § 1. See Strachan-Davidson, *Roman criminal law*, vol. ii, p. 163.

[137] *Dig.* 47, 20, 3, § 2. The penalty was arbitrary or at the discretion of the court: "Poena autem stellionatus nulla legitima, cum nec legitimum crimen sit": *Id.* See infra § 936.

[138] *Principles of the law of Scotland* [20], p. 630. As in Roman law (see preceding footnote), the Scotch punishment of stellionate "was necessarily arbitrary to adapt it to the various natures and different aggravations of the fraudulent acts": *Id.*

[139] This was a variety of the *crimen falsi*, which was defined and punished by the *lex Cornelia de falsis*: see *Inst.* 4, 18, 7; *Dig.* 48, 10; Paul. *Sent.* 1, 12, 3; *Code*, 9, 22.

[140] *Dig.* 47, 10, 13, § 1.

following offenses against wills were punished as crimes: to make a false will or codicil; to alter, rub out, reseal, carry away, or conceal a will or codicil; to open another's will, prior to the death of the testator[141]; for a person writing another's will to incorporate a legacy for himself without the testator's consent.[142] Forgery is a crime also in modern American law.[143]

(6) Miscellaneous Crimes

False weights, raising artificially the price of food. Any person using false weights to sell bread was punished with relegation.[144] To artificially raise in any manner the price of food was punished variously, sometimes with a fine, sometimes with a prohibition from doing business as a merchant, and sometimes with relegation.[145] Reminiscent of these Roman crimes are certain English Common Law crimes relative to the buying up and hoarding food to secure a monopoly and advance the price, which in the United States are usually regulated by statutes.[146] § 932

Offenses against religion, practice of magical arts, violation of burial places. To introduce a new religion of an irrational and disturbing character was punished either with deportation or death.[147] Fortune-tellers (*vaticinatores*) were punished with whipping or imprisonment or deportation.[148] To consult § 933

[141] Paul. *Sent.* 4, 7, 5; *Dig.* 48, 19, 38, § 7. All these offenses were included under the *crimen falsi* of the *lex Cornelia de falsis.*

[142] *Dig.* 48, 10, frag. 1, § 8, frag. 15, frag. 22, § 1.

[143] Clark, *Criminal law*, p. 292.

[144] *Dig.* 47, 11, 6, § 2; *Dig.* 48, 10, 32, § 1. This was one of the *crimina extraordinaria*; and the punishment for this crime was introduced by the Emperor Hadrian.

[145] *Dig.* 48, 12, 2, pr. and § 2; *Dig.* 47, 11, 6, pr. The *lex Julia de annona* (on the *annona* see supra § 898) forbade the artificial raising of the price by a contract for this purpose, and fined the offender 20 aurei (about $80.). Persons attempting to raise the price of food by keeping provisions out of the market were known as *dardanarii.*

[146] Clark, *Criminal law*, p. 354, gives a brief account of the English Common Law crimes of forestalling, regrating, and engrossing.

[147] "Qui novas sectas vel ratione incognitas religiones inducunt, ex quibus animi hominum moveantur, honestiores deportantur, humiliores capite puniuntur": Paul. *Sent.* 5, 21, 2.

[148] *Id.* 5, 21, 1.

fortune-tellers as to the life of the Emperor was punishable with death.[149]

To practise magical or diabolical arts was punished with death[150]; and the possession of books on these subjects was a crime severely punished.[151] To make a religious sacrifice for the purpose of injuring another was a crime, even if no harm resulted from the sacrifice.[152]

To interfere with the proper sepulture of the dead was known as the *crimen sepulcri violati*; and this crime included the mutilation of inscriptions, the demolishing a statue or column or the removal of any part of the tomb, and the robbing of dead bodies or their removal.[153] The punishment was death or the mines or deportation.[154]

3. CRIMINAL PROCEDURE

(1) The Republic

§ 934 **Systems of Republican criminal procedure: (1) that of the numerous jury courts (quaestiones perpetuae); (2) that of the few courts having no juries.** During the Republic criminal jurisdiction was exercised generally with, and exceptionally without, a jury. The presence or absence of a jury differentiated the Roman criminal courts, and thus gave rise to two systems of criminal procedure.

1. The jury courts were the *quaestiones perpetuae*, over which magistrates or judges presided.[155] These courts had jurisdiction of nearly all crimes. A prosecution brought before any of these courts was called a *publicum judicium*[156]:

[149] *Id.* 5, 21, 3.

[150] *Id.* 5, 23, 17.

[151] Paul. *Sent.* 5, 23, 18. Such books were to be publicly burned.

[152] *Dig.* 48, 8, 13 and 14. This crime was punished by the *lex Cornelia de sicariis.*

[153] *Dig.* 47, 12, 8 and 11; *Code*, 9, 19, 1. This offense was deduced as a crime from the *lex Julia de vi publica.*

[154] *Dig.* 47, 12, frag. 3, § 7, frag. 11.

[155] See supra §§ 880, 881 (latter portion).

[156] This term is used in *Dig.* 48, 1; *Inst.* 4, 18.

as this term indicates, it was tried before a jury (*judices*[157]). The guilt or innocence of accused was decided by a majority verdict of the jury.[158]

2. The principal criminal courts without juries at Rome were the consuls and in their absence the praetors,[159] and in the provinces the governors: all of whom by virtue of their magisterial authority (*imperium*) could hear and personally decide certain criminal prosecutions.[160] At Rome the jurisdiction of these courts included certain kinds of appeals and cases affecting slaves.[161] Outside of the city of Rome their jurisdiction included treason (perduellio[162]) and offenses against the security of the government.[163] Moreover their judicial authority (*imperium*) outside of Rome was unrestricted; it was not limited by any rule of the ordinary criminal procedure.[164]

The term employed to designate a prosecution before the courts having no juries was *quaestio*.[165] This system of criminal procedure was expanded under the Early Empire, and became the sole criminal procedure of the Later Empire — being then known as the *cognitio extra ordinem*.[166]

Outline of a prosecution (publicum judicium) in the regular criminal jury courts (quaestiones perpetuae) of the Republic. § 935

The procedure in all of these criminal jury courts (quaestiones

[157] As to the mode of selecting a jury, see supra § 881, latter portion. The number of a jury varied; in important cases it was from 56 to 100; in ordinary cases it was probably much less: see Willems, *Droit public romain*[7], pp. 305–6; Colquhoun, *Roman law*, § 45.

[158] See supra § 881, latter portion; § 880.

[159] See supra § 877; Mommsen, *Staatsrecht*, vol. ii, p. 232 (French transl. *Droit public romain*, vol. iii, p. 267).

[160] See Mommsen, *Strafrecht*, vol. i, pp. 142–50 (French transl. *Droit pénal romain*, vol. i, pp. 162–72).

[161] Mommsen, *Strafrecht*, vol. i, p. 143. Appeals (*provocationes*) during the Republic are discussed supra § 885.

[162] See supra § 915.

[163] Mommsen, *Id.* vol. i, pp. 146–7.

[164] Mommsen, *Id.* p. 144.

[165] Mommsen, *Id.* p. 147.

[166] See infra § 937; Strachan-Davidson, *Roman criminal law*, vol. ii, pp. 159 et seq.

(§ 935) perpetuae) was quite similar. Any Roman citizen or subject.[167] desiring to cause anybody to be prosecuted criminally, could apply to the presiding[168] judge of the appropriate court for permission to make an accusation against the alleged offender.[169] The magistrate then made a preliminary investigation of the facts submitted to him, for the purpose of granting or refusing permission to allow a criminal prosecution (publicum judicium) to be brought.[170]

If permission was granted, the accuser subsequently made, in the presence of both the magistrate and the accused, a formal accusation stating the nature of the offense and the name of the offender.[171] Thereupon the accused was questioned to obtain admissions[172]; then the charge or accusation was formally drawn up[173] and was signed by the accuser and his supporters.[174]

The accusation together with the names of accuser and accused was then recorded in a court register.[175] This constituted the information or indictment (*libellus accusationis*), beyond the limits of which no evidence could be offered at

[167] See supra § 442.

[168] See supra § 880.

[169] The *postulatio rei:* Esmein (Simpson, transl.), *Hist. of Continental criminal procedure*, p. 21; Willems, *Droit public romain*[7], p. 303. If two or more persons simultaneously applied, the judge decided who should accuse the alleged offender (*divinatio*): Gellius, ii, 4; Willems, *Id.* p. 304; *Dig.* 48, 2, 16. But the other persons could assist or corroborate the chief accuser: Esmein (Simpson), *Id.*, p. 22, note 10.

[170] Esmein (Simpson), *Id.* p. 22. The Republican and Early Imperial criminal procedure of the *quaestiones perpetuae* is a reflection of the formulary civil procedure of the same period (see supra § 847): Esmein (Simpson), *Id.* p. 23; see Dig. 29, 5, 25.

[171] The *nominis* or *criminis delatio:* Esmein (Simpson), *Id.* p. 22; Willems, *Id.* p. 304. An instance of a formal accusation is given in *Dig.* 48, 2, 3.

[172] The *legibus interrogare* or *interrogatio ex lege:* Willems, *Id.*; Esmein (Simpson), *Id.* p. 23. The questioning was done by the accuser without the assistance of the magistrate. See, as to admissions, also supra § 867.

[173] The *inscriptio:* Willems, *Id.*

[174] The *subscriptio:* Willems, *Id.;* Esmein (Simpson), *Id.* p. 22, note 10.

[175] The *receptio nominis, referre in reos, recipere inter reos:* see Willems, *Id.*; Esmein (Simpson), *Id.*

the trial by the accuser.[176] The magistrate then appointed (§935) a day for the trial of the accused.[177]

On the day of trial, which was open to the public,[178] both the accuser and the accused[179] must appear in court. If the accuser failed to appear, the accused was immediately discharged and the case was striken from the records of the court.[180] The accuser must personally appear in court and could not be represented by an agent (procurator[181]), although he could have a counsel (patronus, advocatus) to conduct his case.[182] The accused (reus) could engage a counsel to defend him.[183]

The trial began by the accuser making an opening address, in which he stated and outlined the charge against the accused.[184] Then followed the opening address of the accused.[185]

The next step was the taking of evidence, which might be documentary or oral.[186] Witnesses were examined first by the party summoning them and then by the opposite party[187];

[176] See *Dig.* 48, 5, 2, § 9; *Dig.* 48, 2, 2, pr.; Esmein (Simpson), *Id.*

[177] Esmein (Simpson), *Id.* p. 23. The day of trial was fixed either by the statute regulating the tribunal (*quaestio*, — see supra § 880), or by special circumstances; the period of time allowed to the accuser to prepare for trial varied from 10 (a common period) to 110 days or even longer: Willems, *Id.* p. 304. Apparently the magistrate had the power to investigate or to question persons (*inquisitio*), for the purpose of collecting evidence: Esmein (Simpson), *Id.* p. 22.

[178] "Publicum judicium" indicates the publicity of a criminal trial.

[179] The magistrate, if he thought it necessary, could cause the accused to be kept in custody until trial: Willems, *Id.* p. 304, note 10. If the accused was not kept in custody and then failed to appear on the day of trial, he was condemned and sentenced to the penalty prescribed by law: Willems, *Id.*

[180] Willems, *Id.* p. 304.

[181] *Dig.* 48, 1, 13; *Code*, 9, 2, 15; *Cod. Theod.* 9, 1, 15 and 17; Esmein (Simpson), *Id.* p. 23. As to procurators, see supra § 855.

[182] Esmein (Simpson), *Id.* p. 23, note 10. See, as to lawyers, supra §§ 855, 906.

[183] Willems, *Id.* p. 305; Esmein (Simpson), *Id.* p. 23; *Dig.* 3, 1, 1, § 4. See supra § 855.

[184] Esmein (Simpson), *Id.* p. 24; Willems, *Id.* p. 305. "Expositione criminum atque accusationis exordio": *Code*, 9, 1, 20.

[185] Willems, *Id.*; Esmein (Simpson), *Id.*

[186] Willems, *Id.* See supra §§ 863–4.

[187] Esmein (Simpson), *Id.* p. 25. See also supra § 864.

(§935) this system generally was similar to the direct- and cross-examination of Anglo-American law. A free person called as a witness could not be subjected to torture[188]; but a slave could be tortured.[189] Both the accuser and the accused could question each other.[190] The judge did not question the accused.[191]

Although the burden of proof rested on the accuser, yet if the accused had made a confession or if he admitted in open court his guilt, the accuser did not have to proceed further with his case: the accused was condemned and sentenced.[192]

After the evidence was concluded, influential citizens were allowed to make laudatory speeches in favor of the accused.[193] Then both the accuser and the accused could briefly attack the argument of the opposing side, in order to display its weaknesses and to fortify their own evidence.[194]

The next step was the submission of the case to the jury for their verdict. The jury, having been sworn,[195] gave their verdict by ballot.[196] To reach the verdict, a majority vote of the jurymen was necessary.[197] If the vote was equal, it was construed in favor of the accused.[198]

Originally, the jury could render any one of the following verdicts: "Guilty" (*absolvo*), "Not guilty" (*condemno*), "Doubtful" or "Not proven" (*non liquet*): but during the last century of the Republic the jury lost the power to bring in a verdict of *Doubtful*,[199] and their verdict must be either

[188] Esmein, *Id.* p. 24, note 10.

[189] Esmein, *Id.* p. 25. On the subject of torture see also supra § 864, third footnote.

[190] Called the *interrogatio:* Esmein, *Id.* p. 24.

[191] Esmein, *Id.* p. 24.

[192] Esmein, *Id.* As to admissions, see supra § 867.

[193] These *laudationes* might be written as well as oral, and might be made in the name of a provincial city: Willems, *Id.* p. 305.

[194] These argumentative speeches were called *altercationes:* Esmein (Simpson), *Id.* p. 26.

[195] Willems, *Droit public romain*[7], p. 305.

[196] A provision of the *lex Cassia* (137 B.C.): Willems, *Id.* p. 137. Prior to this law the jury voted openly.

[197] Willems, *Id.* p. 306. As to the mode of voting, see *Id.*

[198] Hunter, *Roman law*[4], p. 59.

[199] When this verdict was rendered, Roman law originally provided for a second, third, etc., trial (*ampliatio*) until the jury should be able to

Guilty or *Not guilty*.[200] If the accused was condemned, and his punishment was of a pecuniary nature, the jury had power to estimate the amount of his sentence.[201] There was no appeal from a sentence, although the people by legislative act could pardon a criminal.[202]

(2) The Empire

§ 936 **Systems of criminal procedure during nearly all the Early Empire: (1) that of the jury courts (quaestiones perpetuae); (2) that of the courts having no juries. The new Imperial courts without juries finally became the sole criminal courts of the Empire.** Although the Republican criminal jury courts (quaestiones perpetuae) were continued under the Empire by Augustus and his successors, yet their importance gradually declined, and finally these courts disappeared during the 3d century A.D.[203] The procedure of these courts has already been described.[204]

The old Republican jury courts (quaestiones perpetuae) were displaced by new Imperial courts without juries, such as the court of the city prefect, the court of the praetorian prefect, and other criminal tribunals.[205] The procedure of these

find the accused *Guilty* or *Not guilty*. But about 111 B.C. *ampliatio* was abolished by a statute, the *lex Servilia*, which introduced *comperendinatio* or the postponement of the jury's verdict until the second day after the trial had arrived at the point of the verdict. The effect of this legislation was to divide a criminal prosecution into two parts: (1) the accusation, defense, and evidence; (2) after the interval of a day, the voting of the jury to reach a verdict of *Guilty* or *Not guilty* and the public announcement of the verdict. On this entire subject see Willems, *Droit public romain*[7], p. 306; Hunter, *Roman law*[4], p. 59.

[200] In 70 B.C. the *lex Aurelia* abolished *comperendinatio*, and a final disposition of the prosecution became necessary: Willems, *Id.* p. 307; Hunter, *Id.*

[201] The *litis aestimatio:* Willems, *Id.*

[202] See supra § 885; Willems, *Droit public romain*[7], p. 307.

[203] Supra § 892; *Dig.* 48, 1, 8 (Paulus, supra vol. i, § 99); Willems, *Id.*, p. 467; Mommsen, *Strafrecht*, vol. i, p. 220 and notes (French transl. *Droit pénal romain*, vol. i, pp. 255–7); Strachan-Davidson, *Roman criminal law*, vol. ii, p. 158; Esmein (Simpson), *Hist. of Continental criminal procedure*, p. 27 and note 4.

[204] See supra § 935.

[205] See supra §§ 894–902; Strachan-Davidson, *Id.* vol. ii, pp. 158, 165.

(§936) courts was the magisterial *cognitio extra ordinem*, which had been sometimes employed during the Republic.[206] Thus the exceptional Republican criminal procedure, as amplified under the Early Empire, became the sole criminal procedure of the Empire — especially the Later Empire and including the reign of Justinian.[207]

Although the old term for a criminal prosecution — *publicum judicium* — was still used in the Later Imperial and Justinianean law,[208] this term referred specifically to those offenses originally punishable by the ancient *quaestiones perpetuae* and the statutes creating these courts.[209]

As soon as all Roman criminal courts had become *extraordinaria*,[210] all criminal offenses were prosecuted as if *crimina extraordinaria:*[211] in other words, the Later Imperial and Justinianean law treated as a single class of criminal offenses both the *crimina publica* (crimes of ancient origin introduced by special statutes — chiefly Republican[212] — which prescribed the punishment) and the *crimina extraordinaria* (offenses made crimes originally under the Empire,[213] the punishment of which was frequently at the discretion of the judge[214]).

[206] See supra § 934.

[207] Strachan-Davidson, *Id.* vol. ii, p. 159; Esmein (Simpson), *Id.* pp. 26–29.

[208] See for instance *Inst.* 4, 18; *Dig.* 48, titles 1, 4–11.

[209] *Dig.* 48, 1, 1; *Inst.* 4, 18, §§ 3–12.

[210] For instances of the *cognitio* regularly belonging to the magistrate, see *Dig.* 48, 19, 1, § 3; *Dig.* 1, 12, 1.

[211] Before the middle of the 3d century A. D. was reached, the jurist Macer (c. A. D. 220) writes "qui hodie de *judiciis publicis extra ordinem cognoscant*" (*Dig.* 48, 16, 15, § 1). See also *Dig.* 48, 19, 1, § 3.

[212] Such as the *lex Cornelia de sicariis et veneficis* (*Dig.* 48, 8), which was enacted during the dictatorship of Sulla, *c.* 81 B. C. A few (like the *lex Julia de ambitu* and the *lex Julia de adulteriis*), although enacted by Augustus, really are a continuation of the period of Republican legislation. For a list of these ancient (generally Republican) criminal statutes, see *Inst.* 4, 18 "De publicis judiciis"; *Dig.* 48, titles 1, 4–11. See also supra § 934.

[213] In this category there were many general offenses, including abortion, the defiling of water-courses, using false weights or measures, seduction of minors, adulteration of food, and the 'sweating' of coins: see *Dig.* 47, 11 "De extraordinariis criminibus"; *Dig.* 47, 14, 2; Strachan-Davidson, *Roman criminal law*, vol. ii, p. 162. Compare supra § 935.

[214] See for instance *Code*, 9, 45, 2; *Dig.* 47, 15, 2; *Dig.* 47, 10, 43.

Salient features of a prosecution (cognitio extra ordinem) in the Later Imperial and Justinianean criminal courts, which had no juries. The criminal procedure of the Later Empire and of Justinian was always *extra ordinem*.[215] Superficially, except for the absence of a jury,[216] the outlines of the final Imperial criminal procedure considerably resembled those of the earlier procedure: the final procedure remained accusatorial in form, and it retained many of the old procedural steps, together with their names.[217] But, fundamentally, many of the methods of the final procedure were entirely dissimilar from those of the earlier procedure; these changes were due to the greatly developed power of the courts originally created by the Emperors.[218] § 937

A criminal prosecution was still commenced by an information or indictment (*libellus accusationis*[219]), which must be signed by the accuser.[220] The accuser, as well as the accused, might be kept in custody.[221] But the introduction of severe regulations, as to the bringing of accusations,[222] undoubtedly did much to discourage accusers from making charges and to throw upon the judge the main task of inquiry.

Consequently, *inquisitorial* methods were introduced into criminal procedure: the judge, although still instructed to act impartially,[223] was to question freely, to search into every-

[215] Supra § 936. See also supra § 934.

[216] Discussed supra § 935.

[217] For instance the *nominis delatio:* defined supra § 935.

[218] See supra § 902.

[219] Or at least a *libelli inscriptio.* A form of such an indictment is given in *Dig.* 48, 2, 3, pr. See supra § 935.

[220] "Causa criminis ordinata, id est, inscriptionibus depositis": *Code,* 9, 45, 1.

[221] *Cod. Theod.* 9, 1, 19.

[222] The *inscriptio* (supra § 935) was the essential part of the indictment and made the signer liable, if he were a false accuser or deserted the action: *Cod. Theod.* 9, 1, 5 and 11; *Cod. Theod.* 9, 2, 3; *Dig.* 48, 16, 2; *Code,* 9, 1, 10. An accusation not signed was regarded as the work of a professional informer (*delator*). As to legislation concerning informers, see *Cod. Theod.* 10, 10, 28; *Cod. Theod.* 9, 5, 1.

[223] *Cod. Theod.* 9, 19, 2.

(§ 937) thing, and to make a full inquiry ("plena inquisitione").[224] Whenever the law permitted, the judge could cause the accused to be subjected to torture for the purpose of obtaining a confession.[225] The secrecy of these inquisitorial methods could not fail to increase their strength. Finally, with the growth of official activity to discover crime[226] and to search out dangerous characters,[227] criminal proceedings could be initiated also by police officials.[228]

It is doubtful if the requirements for proof were made more stringent,[229] although new rules of evidence were developed.[230] The judge was given power to question witnesses.[231] To prove a fact two witnesses were necessary.[232]

If the accused was found guilty by the court, the judge had a certain amount of discretion in sentencing the offender.[233] An appeal could be taken from the sentence of the court to the next higher court; and if the case was important enough, it could be appealed either to the praetorian prefect or even to the Emperor.[234]

[224] *Cod. Theod.* 2, 18, 1. "Citra sollemnem accusationem posse perpendi": *Code*, 9, 2, 7.

[225] Esmein (Simpson), *Hist. of Continental criminal procedure*, § 28. Although torture was always allowed in cases of treason and lèse-majesté, in other cases the torture of certain privileged classes of citizens was forbidden: see *Dig.* 49, 16, 3; *Cod. Theod.* 9, 35, 1; *Cod. Theod.* 9, 19, 1; *Cod. Theod.* 9, 16, 6. On the subject of torture see also supra §§ 935, 864 (third footnote).

[226] "Publicae sollicitudinis cura": *Cod. Theod.* 9, 3, 1.

[227] See *Dig.* 1, 18, 13.

[228] Such as the *agentes in rebus*, *irenarchae*, *stationarii:* see *Code*, 12, titles 20–4; Esmein (Simpson), *Id.* p. 29.

[229] Although *Code*, 9, 47, 16, seems to hold contra, the consensus of opinion is as stated in the text: Esmein, *Id.*

[230] See Esmein (Simpson), *Id.* p. 29.

[231] *Dig.* 22, 5, 3, § 3. This rule, originated by Hadrian, was finally made of general application: Esmein, *Id.* In Republican Roman law the judge had no such power: supra § 935.

[232] *Code*, 4, 20, 9. The earlier rule is given in *Dig.* 22, 5, 1. See supra § 859.

[233] Esmein, *Id.*

[234] Supra § 904. Willems, *Droit public romain*[7], pp. 432, 471; Mommsen, *Strafrecht*, pp. 275–8. See *Dig.* 49, 1, 6; *Code*, 7, 62, 29.

4. ROMAN AND MODERN CRIMINAL PROCEDURE

Influence of Roman criminal procedure on modern law. § 938 The jury (judices) feature of the Republican and Early Imperial *controversial procedure*, which prevailed in the quaestiones perpetuae,[235] constitutes the Roman root of the Anglo-American trial by jury.[236] Our criminal procedure is also controversial and litigious in character.

Moreover, the two most important features of the Roman verdict are repeated in modern Scotch law: (1) it is not necessary that the jury be unanimous — a majority is sufficient for the verdict[237]; (2) a jury may render a verdict of "Not proven" (a middle course between "Guilty" and "Not guilty").[238]

The *inquisitorial procedure* of the Later Empire[239] is the parent of the modern criminal procedure of Continental European and allied systems of law: although these nations have adopted the English jury for use in important criminal cases, yet their criminal procedure — like that of the Later Roman Empire[240] — is really "an investigation conducted by government officers for the purpose of detecting criminality."[241]

For instance in France[242] the right to initiate criminal

[235] See supra §§ 934, 935.

[236] See supra § 881; vol. i, § 371.

[237] Erskine (Rankine), *Principles of the law of Scotland*[20], p. 651. See supra §§ 935, 881.

[238] Erskine, *Id.* It generally involves acquittal of the accused: *Id.* The Roman jury after 70 B. C. lost the power to render a verdict of "Not proven" or "Doubtful": see supra § 935.

[239] See supra § 937.

[240] See Id.

[241] Coudert, *French criminal procedure*, 19 Yale Law Journal, p. 329.

[242] When the French kings were confronted with the necessity of developing a rational criminal procedure for the royal courts, they naturally imitated the ecclesiastical courts, which still continued the Roman procedure. In 1539 Francis I introduced Roman procedure into the French courts; in 1670 the Roman influence was greatly increased in the elaborate codification of criminal procedure made by Colbert in the reign of Louis XIV: upon this ordinance of 1690 is largely based Napoleon's comprehensive

(§ 938) proceedings belongs solely to government officers[243]; after an accusation or charge has been made by some official,[244] the prisoner and the witnesses are separately examined secretly by the *juge d'instruction*[245] at the conclusion of his investigation the judge either releases the accused or sends him (and the record) to the proper court for trial; when the prisoner is tried, a detailed examination of his whole life history — already thoroughly developed before the *juge d'instruction* — is made by the president or chief judge of the trial court[246]: all these proceedings are manifestly based on the inquisitorial method of procedure.

Some of the procedural terminology of the Roman law has survived in modern law. For instance, in French law, "action publique"[247] means a criminal prosecution, just as "judicium publicum" meant the same thing in Roman law[248]; in French law the information or indictment is called the "acte d'accusation,"[249] which is very reminiscent of the "libellus accusationis" — the Roman term for indictment.

Code d'instruction criminelle of 1808, now law in France. On these criminal procedure ordinances of Francis I and Louis XIV, see Esmein (Simpson), *Hist. of Continental criminal procedure*, pp. 145–74, 183–250.

[243] *Code of criminal instruction*, art. 1. If the crime is a tort, the civil action of the injured party may be brought before the court hearing the criminal prosecution: art. 3.

[244] *Code of crim. instr.* art. 8–9.

[245] *Id.* art. 55–136.

[246] See for instance *Id.* art. 319, 329.

[247] Used in *Code of crim. instr.* art. 3.

[248] See supra § 935.

[249] *Code of crim. instr.* art. 241.

CHAPTER III

MINOR BRANCHES

Financial law. Under the Republic the treasury of the State was known as *aerarium;* but under the Empire the treasury was usually called *fiscus.*[1] During the Empire the **revenues of the State** consisted of income from the public domains,[2] income from the mines of the State,[3] taxes,[4] and bequeathed, forfeited, or confiscated property.[5] § 939

For purposes of taxation a census of the inhabitants of the Empire and their property was taken every few years.[6] During the Later Empire the general direct tax or tribute levied annually throughout the Empire became known as the indiction (*indictio*).[7] The amount of indiction might be increased (*superindictio*[8]) or diminished (*relevatio*) at the

[1] Willems, *Droit public romain*[7], p. 492.

[2] *Ager publicus:* see *Dig.* 47, 21, 3, § 1; *Dig.* 49, 14, frag. 3, §§ 6, 9–10, frag. 45, § 13; *Dig.* 6, 3, 1; Gaius, 3, 145; Willems, *Id.* p. 477. But the income of the lands and other property of the Emperor were not public but private: these went to the support of the Emperor, and out of these he made benefactions: Willems, *Id.* pp. 627–9.

[3] Willems, *Droit public romain*[7], pp. 627–9. See also Mispoulet, *La lex metallis dicta récemment découverte en Portugal,* 31 Revue gén. du droit, etc. pp. 20–32; Mispoulet, *Le régime des mines à l'époque romaine et au moyen-âge d'après les tables d'Aljustrel,* Paris, 1908.

[4] The principal direct Early Imperial taxes were the *solarium, cloacarium, portoria,* and provincial tributes (*vectigalia, stipendia*): see Willems, *Id.* pp. 477–8. The principal indirect taxes were the 5% tax on manumissions, the 5% tax on inheritances and legacies (treated supra § 669), the 4% tax on the sale of slaves, and the 1% tax on auction sales: Willems, *Id.* pp. 481–2. During the Later Empire beginning with Diocletian the direct taxes were unified into a general tax or tribute known as *jugatio* or *capitatio terrena,* Italy paying at the same rate as the provinces: Willems, *Id.* pp. 620–26.

[5] Willems, *Id.* p. 482.

[6] Willems, *Id.* pp. 479–81.

[7] *Cod. Theod.* 11, 16, 7 and 11; *Cod. Justinian.* 10, 16, 3. This term originally meant the proclamation fixing the amount of the tax, which was posted in the principal city of each diocese; this indictio or edict was written in purple ink and subscribed by the Emperor with his own hand.

[8] *Cod. Theod.* 11, title 1, 36; title 6, 1; title 16, 7–8 and 11; *Cod. Justinian.* 10, 18.

discretion of the Emperor.[9] It is interesting to notice that from A.D. 312 the indiction served also as a chronological era, designating a period of 15 years.[10] Moreover the indiction, as a chronological era, descended into the Middle Ages.[11]

During the Empire the **expenditures of the State** were for civil and military administration,[12] governmental postal service and post-roads,[13] education,[14] libraries at Rome,[15] public works at Rome,[16] religious worship and public games at Rome,[17] food-supplies (*annona*) distributed to citizens at Rome,[18] and charitable expenses for the maintenance of poor children (*alimentatio*) at Rome and other cities.[19]

§ 940 **Military law, ecclesiastical law.** The Roman military law, although well preserved,[20] is no longer important. Ecclesiastical law, as developed during the Empire, has already been considered.[21]

[9] *Cod. Theod.* 11, title 16, 10; title 20, 6.

[10] According to the Roman usage and the medieval practice prior to the 12th century, mention of an indiction did not indicate which period of 15 years was meant. Furthermore the term indiction referred to any separate year and not the entire period of 15 years: thus if the 8th indiction is mentioned in a document, it refers to the 8th year of one of the indictions, but which one is not certain. See Dr. William Smith's note on footnote 170 of ch. 17, vol. ii, of Gibbon's *Decline and fall of the Roman Empire*.

[11] In the 12th century the period of 15 years became definitely known as an indiction, and there was made a computation of the number of years *from the birth of Christ*: an event was then placed in a particular year of an indiction, for instance *Indictionis* lxxx, *anno* 6: see Gibbon, *Id.*

[12] Willems, *Id.* pp. 483–4. [13] Willems, *Id.* pp. 484–5.

[14] Willems, pp. 487–8. As to State law schools, see supra vol. i, § 155.

[15] Willems, *Id.* 488. They were administered by *procuratores a bibliotheca*.

[16] Willems, *Droit public romain*[7], pp. 485.

[17] Willems, *Id.* pp. 460, 463, 485.

[18] Willems, *Id.* p. 485. The citizens of Constantinople, the new capital of the Later Empire, were similarly favored: see *Code*, 11, 23–4. See also supra § 898, as to the *praefectus annonae*.

[19] Willems, *Id.* pp. 488–90. Trajan admitted 5000 children, at Rome alone, to the gratuitous *frumentationes*.

[20] Willems, *Id.* pp. 557, 614: Smith, *Dict. of Greek and Roman antiquities*[3], vol. i, "exercitus".

[21] Supra § 903; vol. i, §§ 116–9, 144–53, and see §§ 225–30.

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